Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JERRY CHARLES VAUGHAN,

Petitioner,

Against

FRED LAWRENCE COX, OFFICER, Individually And in his official capacity as an Officer of the Coweta County Sheriff's Department; COWETA COUNTY, GEORGIA; MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a suspect of a non-violent crime is fleeing to elude in a vehicle on a major highway, can an officer have a "reasonable belief" that shooting to kill the suspect passenger, without warning, is lawful where the court finds that a reasonable jury could find a warning was feasible, and where the shooting is contrary to locally and nationally recognized standards of police conduct, simply on the basis that the "where feasible" warning requirement of *Tennessee v. Garner* has never been sufficiently defined for qualified immunity purposes?

2. Is shooting to kill a suspect of a non-violent crime, solely because the suspect is fleeing to elude in a vehicle down a major highway at ten to fifteen miles per hour over the speed limit, conduct that is so obviously violative of the suspect's constitutional right to be free from excessive force that all reasonable officers should know that it is unlawful without further fact specific guidance from the courts?

LIST OF PARTIES

The caption contains the names of all parties to the proceeding which are as follows:

JERRY CHARLES VAUGHAN
FRED LAWRENCE COX
MIKE YEAGER
COWETA COUNTY, GEORGIA

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit was reported as follows:

> *Jerry Charles Vaughan, Plaintiff-Appellee v. Fred Lawrence Cox, Officer, Individually and in his official capacity as an officer of the Coweta County Sheriff's Department, Coweta County, Georgia, et al., Defendants-Appellants, 264 F.3d 1027 (11th Cir. 2001).*

The Petition for Rehearing was denied on November 13, 2001. The District Court entered its order that the Mandate of the United States Court of Appeals be made the judgment of that court on December 14, 2001.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on August 31, 2001 (one judge dissenting). Petitioners filed their Suggestion of Rehearing En Banc on the 21st day of September, 2001 in the court below. Said Petition for Rehearing was denied (one judge would have granted the petition) on November 13, 2001. This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C. § 1254(1).

PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The relevant constitutional provisions involved are:

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutes involved are:

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On January 5, 1998, at approximately 7:30 a.m., on I-85, while travelling toward Atlanta, Plaintiff Jerry Vaughan, age 19, was rendered a paraplegic when Defendant Cox, a deputy for the Coweta County Sheriff's Department, opened fire at the pickup truck in which Vaughan was a passenger. (R1-17, Vaughan depo. pp. 65-69; Cox depo. pp. 39-42) Vaughan was suspected of stealing the truck. (R1-17, Cox depo. p. 40; R1-17, Looney depo. pp. 7-8)

Officer Looney of the Coweta County Sheriffs' Department spotted the suspected stolen vehicle and began to follow. Defendant, Fred Cox overheard Deputy Looney's radio transmission, and joined in the pursuit. (R1-17, Cox depo. p. 39; Looney depo. p. 7) When Looney pulled behind the truck in which Vaughan was travelling, the driver moved from the left lane to the center lane as if to allow the officer to pass. (R1-17, Cox depo. p. 39) Looney moved over to the center lane behind the truck and Defendant Cox "flew" by them in the left lane. (R1-17, Cox depo. pp. 39-40) As he went by them, Cox observed that the vehicle occupied by Vaughan did not exactly match the description of the vehicle reported stolen. However, Cox decided that the passenger matched

the description of the person that they were looking for and he decided to stop the vehicle by use of a "rolling roadblock" procedure prior to using blue lights. (R1-17, Looney depo. pp. 7-10; Cox depo. pp. 39-40; Vaughan depo. p. 69) The vehicles were all travelling at the approximate speed of the posted speed limit, 65 to 70 m.p.h., with the normal flow of traffic, and the driver of the vehicle in which Plaintiff was a passenger was observing all traffic laws. (R1-17, Looney depo., pp. 6-10)

Cox then positioned himself directly in front of the truck, while Looney positioned himself directly behind the truck. (R1-17, Cox depo. pp. 39-41; Looney depo. pp. 8-10) When Cox hit the brakes to perform a rolling roadblock, this caused an unavoidable bump between the patrol car and the pickup truck. (R1-17, Vaughan depo. pp. 69,72,76; R2-28, Rayson aff., para. 6) Only after that point did Cox and Looney activate their blue lights. (R1-17, Vaughan depo pp. 69,72,76; R2-28, Rayson aff., para. 8; R2-21, Looney report, Plaintiff's exh. 5)

Plaintiff Vaughan then put his hands out of the passenger window to signify that he had surrendered. (R1-17, Vaughan depo. p. 84) Cox, Looney, and Deputy Donna Gordon saw Plaintiff put his hands out of the passenger side window. (R1-17, Cox depo. p. 43; Looney depo. p. 29; Gordon report, Plaintiff's exhibit 6) As part of the radio transmission, Cox states that "vehicle is going northbound. He also hit me in the rear, and they act like they want to slow down, he's got his hands out the window." (R2-21, Plaintiff's exh. 10; R2-21, Plaintiff's exh. 5)

At approximately the same time, Cox dropped back on the left side of the truck, lowered his passenger side window, unholstered his 9mm Glock, and fired three shots into the driver's side of the suspect truck. (R1-17, Vaughan depo., pp. 69, 81-82; Cox depo. p. 42) The last of these three shots entered the truck and struck Vaughan in the spine, paralyzing him instantly from the chest down. (R1-17, Vaughan depo. pp. 28,69-71) Cox pulled his cruiser parallel to the truck, turned his rooftop lights on and waited for thirty to forty-five seconds before firing his weapon. (R1-17, Vaughan depo. pp. 69,82)

At the time of the initial shooting, other than the bump caused when Cox hit his brakes, there was no contact, or attempted contact by the truck with any other vehicles, and the truck never attempted to strike Cox. (R1-17, Vaughan depo. pp. 77-83; R2-28, Rayson aff. para. 11)

The chase then continued in a more dangerous manner with another round of shots being fired by Cox. The pursuit ended with the suspect vehicle eventually striking a concrete guardrail. (R1-17, Vaughan depo. pp. 70-71)

In regard to the firing of shots at Jerry Vaughan, when asked "were you trying to hit the driver?", Cox responded "yes", as to both series. (R1-17, Cox depo. p. 52) When asked if he had any consideration as to the consequence of a bullet striking a passenger, he responded "I considered the passenger the same as the driver." (R1-17, Cox depo. p. 54) Cox stated that if he had hit the driver, he would have taken his patrol car from the left lane, pushed the pickup truck, along with the trailer

with personal watercraft on it, in the heavy traffic, across the interstate and off the road. (R1-17, Cox depo. p. 53) This was a maneuver he had not received any training on, but had only seen on Television. (R1-17, Cox depo. pp. 53-54)

The Georgia Peace Officers Standard and Training Council Handbook states that Officers should not fire at other vehicles from their vehicles while in high-speed pursuit. (R2-21, Plaintiff's exh. 3, p. 7.2-9) The handbook also states that "it is not recommended for an officer to fire at a vehicle coming at him, and that an officer is not legally justified in firing at a vehicle which passes him." (R2-21, Plaintiff's exh. 3, p. 7.2-9) These Georgia standards have been nationally recognized in the law enforcement profession since at least 1982. (R2-25, White depo. 1/5/00, pp. 11, 45, 63, 87; White depo. 1/7/00, pp. 6, 92, 94; R2-28, Keller aff. para. 9(K)) The shooting of Jerry Vaughan by Defendant Cox was a violation of well-established "written" Coweta County department policy, as well as established standards of law enforcement procedures recognized both in Georgia and nationally. (R2-28, Keller aff. para. 9)

Standards for Police Procedures found in the training keys for the International Association of Chiefs of Police also discourage high speed pursuits in the circumstances of this case. (R2-21, IACP Training Key 499) and state "officers should not discharge a firearm at or from a moving vehicle except as the ultimate measure of self defense or defense of another person when the suspect is using deadly force *by means other than the vehicle.*" (R2-21, IACP Training Key 325) (emphasis added)

Coweta County Use of Force Policy states that "all reasonable means shall be employed before escalating to more severe force." (R2-21, Plaintiff's exh. 4, p. 80) Deadly force used for self-defense is only authorized when the deputy reasonably believes the force is necessary to defend their own life or the life of another and that all other available means of defense have failed or would be inadequate or dangerous. (R2-21, Plaintiff's exh. 4, p. 81) Said policies further state that "deliberate physical contact between vehicles at any time will not be justified," (although someone has later written in the word "may"). (R2-21, Plaintiff's exh. 4, p. 92) Said policy further states that "because of the potential danger involved, the pursuing deputy shall not pull along side a fleeing motorist in an attempt to force him into a ditch, curb, parked car, or other obstacles." (R2-21, Plaintiff's exh. 4, p. 92) (emphasis added)

Cox had been informed by the previous Sheriff's administration that shots should not be fired at a moving vehicle from a moving vehicle, but he did not feel that standard applied to him in this particular case. (R1-17, Cox depo. p. 57)

A car is not to be considered a deadly weapon justifying the use of deadly force when the officer is also in a car. (R2-28, Keller aff. p. 9; R1-17, IACP Training Key 325, Plaintiff's exh. 2) Incidental contact between vehicles cannot be used as justification for use of deadly force. (R2-28, Keller Aff. p. K, L) Retired State Patrol Officer Vandiver Keller, one of Plaintiff's experts, presented his affidavit that the shooting of Jerry Vaughan was not justified because Vaughan offered no true, or reasonably perceived threat of deadly force to Cox or anyone else prior to the

shooting and Defendant Cox's own actions of creating an unreasonable risk of danger to himself cannot be used as justification for use of deadly force. (R2-28, Keller aff. para. 9)

Despite these longstanding nationally recognized standards, Defendant Cox had fired his weapon from his moving vehicle into another moving vehicle with unarmed passengers involved, during high speed pursuit, just four months prior to the shooting at issue, in September, 1997. (R1-17, Cox depo. pp. 32-34; Yeager depo. p. 31) Cox had conducted a high speed pursuit through a heavily populated area, and then, when the pursuit reached a rural area, Cox fired his gun into the back of the pursued pickup truck, striking the passenger in the arm. The truck was being pursued for a suspected burglary. (R1-17, Cox depo. pp. 32-34; Yeager depo. p. 30-31)

In addition to opinions from two experts for Plaintiff stating Defendant Cox's actions were improper and that he should have known they were improper, the expert for Defendants, P.O.S.T. Firearms Instructor Ernie Tobin, states that if you accept the version of the facts as set forth by Plaintiff and the driver of the truck, then Defendant Cox's actions would not have been justified. (R2-26, Tobin depo. pps. 41-42)

The Eleventh Circuit Court of Appeals held (contrary to the District Court) that the shooting did constitute a seizure, and that a reasonable jury could find both that the shooting was unreasonable and that it would have been feasible for Cox to give a warning before using deadly force. However, citing the recent Supreme Court

opinion of *Saucier v. Katz*, 533 U.S. 194, 150 L.Ed.2d 272, 121 S.Ct. 2151, 2158 (2001), the panel (with one Judge dissenting, Hon. John T. Newnan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation) held that

> "a reasonable officer in Deputy Cox's position could have believed that he had sufficient probable cause to apply deadly force. At the time he fired his weapon, Cox has clearly demonstrated to the trucks occupants that he wanted them to stop and had seen the driver instead speed up to avoid apprehension. A reasonable officer in Cox's position could have concluded that the suspects, who were fleeing down a major highway at approximately eighty to eighty-five miles per hour in a pickup towing a trailer laden with two personal watercraft were not about to stop, posed a serious threat of harm to other motorists." *Vaughan v. Cox*, 264 F.3d 1027, 1036 (11th Cir. 2001); App. 14.

The Court then went farther, and although they had already held that a reasonable jury could find that a warning before use of deadly force was feasible, the majority stated that:

> "the law was not sufficiently established . . . that Defendant Cox knew that he needed to warn the occupants of the truck before firing his weapon. . . . As noted above, the Supreme Court has held that a police officer must warn a suspect of the potential application of deadly force 'where feasible.' See *Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701. However, aside from establishing a broad mandate to provide some form of warning, the *Garner* Court made no effort to define under what factual situations such a warning would be necessary. Nor has the Supreme Court,

> this Court or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case. In short, the law was not defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson. Accordingly we affirmed the district court's grant of summary judgment to Deputy Cox because he is protected by qualified immunity." *Vaughan* at 1036, 1037; App. 15.

This action was brought pursuant to 42 U.S.C. § 1983, 1988 (1984) to redress deprivation, under color of law of rights secured by the Fourth and Fourteenth Amendments to the United States Constitution. Jurisdiction in the lower court was proper pursuant to 28 U.S.C. §§ 1343 and 1331 (1984).

REASONS FOR GRANTING THE WRIT

A. This case involves one of compelling national interest and great importance because the Eleventh Circuit Court of Appeals has held that the fact that a vehicle is fleeing to elude at approximately ten to fifteen miles per hour over the speed limit on a major highway would provide a law enforcement officer with a reasonable belief that deadly force is justified to stop the suspect.

The Court below held that material issues of fact remained as to whether or not the continued flight of the Plaintiff's vehicle presented an immediate threat of

serious harm to Cox or others, that the record did not reflect or make clear that the officers were in immediate danger from the suspects at the time of the shooting, and at that time there was no evidence that the suspects had or were likely to menace other drivers. *Vaughan* at 1034, App. 10. However, the Court went on to hold that because the truck appeared to be speeding up from the speed limit to approximately eighty to eighty-five miles per hour down a major highway in a pick-up truck towing a trailer that a reasonable officer in Deputy Cox's position could have believed that he had sufficient probable cause to use deadly force. *Vaughan* at 1036, 1037; App. 14.

Under this line of reasoning, and interpretation of constitutional law, officers would be reasonable in believing that they were justified in shooting to kill any motorist on a major highway fleeing to elude capture who is speeding because speeding on a major highway is dangerous. For various reasons, suspects of crimes of all types and severities flee to elude capture by law enforcement officers every day across this country. When fleeing, it should be safe to assume that most, if not all of these fleeing suspects drive their vehicles over the speed limit. It is probably also safe to assume that the great majority of these police pursuits involve travel on a major highway. The effect of this ruling allowing an officer qualified immunity under these common facts quite obviously could cause frequent and deadly shootings by any officer involved in a high speed pursuit on the sole basis that if they were not killed immediately, they would, by virtue of their speed, be a danger to other motorists.

Further, the well-established written police procedures for the State of Georgia, the Coweta County Sheriff's Department, and the International Association of Chiefs of Police all, when taken as a whole, should provide notice to all reasonable officers in Defendant Cox's position both that shooting to kill the suspects under these circumstances was unlawful and that a warning was required before using deadly force. While it is acknowledged that policies and procedures cannot create a higher constitutional standard, they should be considered when determining the objective reasonableness of Defendant Cox's actions and the knowledge he should be charged with.

The tremendous importance and far reaching effects of the Eleventh Circuit's decision require that this Petition for Writ of Certiorari be granted to correct this grievous misinterpretation of constitutional law that undoubtedly will have a devastating effect on the constitutionally protected right to be free from excessive force at the hands of law enforcement officers.

B. The Eleventh Circuit has decided an issue of Federal law of great importance which appears to be one of first impression that should be settled by this Court, i.e., whether or not the "where feasible" warning language of *Tennessee v. Garner* is sufficiently clear to provide notice to state actors of when a warning is necessary before use of deadly force, or if this language needs further, fact specific definition, before being applicable as "established law."

Shepardizing *Tennessee v. Garner* reveals that approximately one thousand cases have cited to *Tennessee v. Garner*, 471 U.S. 1, 85 L.Ed.2d 1, 105 S.Ct. 1694 (1985), since its issuance in 1985. *Garner* has been one of the most important and most frequently cited civil rights cases regarding use of excessive force since the enactment of 42 U.S.C. § 1983. It sets the standards for judging the reasonableness of use of deadly force by law enforcement. The pertinent criteria has been that "deadly force may be used if necessary to prevent escape, . . . if the suspect threatens the officer with a weapon, or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . and if, where feasible, some warning has been given." *Garner*, 471 at 11, 105 S.Ct. at 1701.

The Eleventh Circuit however has interpreted language from *Anderson v. Creighton*, 483 U.S. 635, 98 L.Ed.2d 523, 107 S.Ct. 3034 (1987) to require that there be a factually substantially similar case pre-dating the conduct in question in order to make the law clearly established as to the facts at hand. *Vaughan* at 1036, 1037; App. 14-15.

After acknowledging the "where feasible" warning requirement of *Garner*, the Eleventh Circuit states that:

> "aside from establishing a broad mandate to provide some form of warning, the *Garner* Court made no effort to define under what factual situations such a warning would be necessary. Nor has the Supreme Court, this court, or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case. (citations omitted) In short, the law was not defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson." *Vaughan* at 1037; App. 15.

This holding was made after the Court stated that:

> "a reasonable jury could find that it was feasible for Cox to warn the truck's occupants of the potential application of deadly force. According to Vaughan's version of events, Cox pulled his cruiser parallel to the truck, turned his rooftop lights on, and waited for thirty to forty-five seconds before firing his weapon. A reasonable jury could therefore conclude that Cox had the time and opportunity to warn Vaughan and Rayson that he was planning to use deadly force before he opened fire." *Vaughan* at 1035; App. 10-12.

The adequacy of the "where feasible" language of the *Garner* holding in regard to providing law that is "clearly established" has never been before this Court. Given the tremendous reliance upon this case in applying constitutional law in federal and state courts across this country,

this issue is of immediate and utmost importance. If the Eleventh Circuit ruling is allowed to stand without final settlement of this issue by this Court, the holding in *Vaughan* will likely open up a whole "new can of worms" in the area of use of deadly force. By requiring the "where feasible" warning language to be factually defined to apply to specific factual situations before it can create "clearly established law" would largely nullify the warning requirement mandated by *Garner*.

C. A decision by this Court is needed to resolve apparent inconsistencies in decisions of the Federal Appellate Courts regarding use of deadly force, without warning, against fleeing suspects.

The Eleventh Circuit decision below is inconsistent with other Federal Appellate Court decisions in this area of law. The First Circuit, in *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001) has held that officers of the state need not be instructed that the specific conduct at issue was unlawful. The Court found that it is enough that the state actor could draw reasonable inferences that his conduct violated federal law based on pre-existing law, as long as the unlawfulness of the conduct is made apparent.

The Seventh Circuit, in both *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) and *U.S. v. Bradley*, 196 F.3d 762 (7th Cir. 1999) has held that a suspect fleeing in a motor vehicle, even if that motor vehicle may have been coming toward the law enforcement officer, does not, with those facts alone, establish sufficient grounds for a reasonable

police officer to believe that it would be lawful to use deadly force to stop the suspect.

The Eighth Circuit, in *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), held that if there is a fact question as to whether or not a warning was feasible before use of deadly force, or if there is a question of fact as to whether or not the suspect posed a threat of serious physical harm or death to the officer or others at the time of the shooting, that summary judgment on qualified immunity grounds would be improper. This ruling directly contradicts the Eleventh Circuit ruling in *Vaughan*, where substantial material factual issues remain, and the court held that a reasonable jury could find both that the officer was unreasonable in his firing on the suspect and that a warning before use of deadly force was feasible. The only uncontroverted facts, that the suspect vehicle was fleeing to elude at ten to fifteen miles per hour over the speed limit, were not sufficient to provide a reasonable belief that shooting to kill the suspects was permissible.

In *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), determining qualified immunity under the standard set forth by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 150 L.Ed.2d 272, 121 S.Ct. 2151 (2001), the Ninth Circuit looked first-to whether the interest in the State to stop the suspect by use of deadly force outweighed the interest of the suspect in his life and to be free from use of excessive force. ("A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury.") *Deorle* at 1281. Despite the fact that they could find no prior case with substantially similar facts involving shooting suspects with "bean bags," the

court found that the law was clearly established that shooting in those circumstances, without first giving a warning, would be unlawful. In applying the "where feasible" warning requirement of *Garner,* the Ninth Circuit held that the desirability and feasibility of giving a warning in that case was obvious.

In *Rosales v. City of Phoenix,* 2001 U.S. App. LEXIS 27599 (9th Cir. 2001), the Ninth Circuit held that because the officers' own statements did not show justification for use of deadly force, the officers were not entitled to qualified immunity. The officers offered no specific evidence that the Plaintiff posed a significant or specified threat of death or serious bodily injury to the officers or others. In *Bray v. County of San Diego,* 1994 U.S. App. LEXIS 4289 (9th Cir. 1994), the Court held that officers who fired shots at a suspected stolen vehicle that was backing toward the officers were not entitled to qualified immunity simply because the moving vehicle created a danger. In *Vaughan,* Officer Cox, during his deposition, stated that the reason he fired at the Plaintiff's vehicle was because the vehicle swerved at him when he was parallel to them and he had his gun aimed at the car. This evidence is highly disputed by both the driver and the Plaintiff, where they contend that they did not swerve at all except after Cox began firing shots, when they started ducking to avoid being hit by the officers' fire. (R2-28, Rayson aff. p. 12; R1-17, Vaughan depo. pp. 81-84) Under the Ninth Circuit reasoning cited above, that court would clearly hold that because a genuine issue of material fact existed as to the justification for the use of deadly force

without first giving a warning existed, summary judgment would not be proper in *Vaughan*. Similarly, in *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), the Ninth Circuit held that although a suspect had been shooting at officers and was on his way back to his cabin toward his gun, it was unreasonable for the officers to shoot the suspect without first giving a warning of the impending use of deadly force. (*See also, Perrin v. Gentner* 2001 U.S. Dist. LEXIS 21221 (December 13, 2001), where that court cited the applicable standard to be that unless infeasible, an officer must issue a warning before using deadly force.)

Guidance by this Court is necessary to provide uniformity across the courts of the United States in dealing with the issues of what law is "clearly established" and whether or not the law in *Garner* is sufficiently explicit to qualify as "established law" for qualified immunity and summary judgment purposes.

D. The Writ should be granted in this case because the Eleventh Circuit ruling appears to conflict with prior Supreme Court rulings that the facts of prior case law do not have to be fundamentally similar to provide notice of unlawfulness if pre-existing law makes the unlawfulness of Defendant's conduct apparent.

The Eleventh Circuit in this case has held that the "where feasible" warning requirement of *Tennessee v. Garner* has not been sufficiently established by pre-existing case law to make clear that a warning was necessary under the facts of this case. *Vaughan* at 1036, 1037; App.

14-15. This Court, in *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), stated that

> in trying to establish whether or not law is "clearly established" the goal is to insure that officials reasonably can anticipate when their conduct may give rise to liability. Liability will attach only if the contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Id.* at 640.

In analyzing the "clearly established" standard as it applies to criminal statute 18 U.S.C. § 242, this Court has held that the decisions of the Supreme Court have not demanded precedents that applied the right at issue to a factual situation that is "fundamentally similar". *U.S. v. Lanier*, 520 U.S. 259, 269, 137 L.Ed.2d 432, 117 S.Ct. 1219 (1997). The Court went on to hold that the "fundamentally similar" factual standard "would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." *Id.* at 270. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,' *Anderson, supra*, at 640. As Judge Daughtrey noted in her dissenting opinion in this case, " 'the easiest cases don't even arise. There has never been . . . a Section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or

criminal] liability.' " 73 F.3d at 1410." *Lanier,* at 271 (citations omitted.) The *Vaughan* case of the Eleventh Circuit however, would require that decisional law as to the warning requirement in *Garner* be inapplicable as any guiding precedent unless and until it has been applied and interpreted in cases with similar factual circumstances.

CONCLUSION

The Eleventh Circuit opinion in *Vaughan* deals with issues at the very core of constitutional civil rights protection. It effectively nullifies a significant component of *Tennessee v. Garner,* the seminal civil rights case involving use of excessive force for the last seventeen years. It involves an issue of national interest by granting qualified immunity to an officer using deadly force to stop a fleeing suspect of a non-violent crime based upon the only undisputed facts in the case: the suspect vehicle was fleeing to elude apprehension driving ten to fifteen miles per hour over the speed limit on a major highway. This is a situation that occurs everyday somewhere in the United States and is reported in the media on a regular basis.

This case involves rulings of law that obviously would have been made differently had the case been heard in different circuit courts of appeal. It is in the best interest of furthering the development of the law in the areas of use of deadly force and qualified immunity that specific guidance and direction be given by this Court. Repercussions from this Court's failing to accept this case and correctly and finally settle the issues presented in

this case would alter the ever-changing landscape of civil rights law in a way that would take countless lives and possibly a tremendous volume of case law to rectify. Eventually, these issues will have to be settled by the Supreme Court to prevent continued development of conflicting case law among the circuit Courts of Appeal.

Plaintiff Jerry Vaughan hereby respectfully moves this Court to grant this Petition for Writ of Certiorari in order that substantial justice in an area of tremendous national importance be done.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14380

D. C. Docket No. 99-00006-CV-JTC-3

JERRY CHARLES VAUGHAN,

Plaintiff-Appellant,

versus

FRED LAWRENCE COX, OFFICER, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, Coweta County GEORGIA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(August 31, 2001)

Before CARNES, COX and NOONAN*, Circuit Judges.

COX, Circuit Judge:

Jerry Charles Vaughan appeals the district court's order granting summary judgment in favor of Deputy

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* Honorable John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Fred Lawrence Cox, Coweta County, Georgia, and Coweta County Sheriff Mike Yeager on Vaughan's 42 U.S.C. § 1983 claims related to injuries he suffered during a police chase. We affirm in part and vacate and remand in part.

Background[1]

In the early morning of January 5, 1998, the Sheriff's Department of Coweta County, Georgia received a report that a red pickup truck with a silver tool box in its bed had been stolen from a service station along I-85 south of Atlanta. The report included the information that the suspect, a white male wearing a white t-shirt, was believed to be heading north on I-85. In response to the report, Deputy Cox and Deputy Jeff Looney headed to the northbound lanes of I-85 in separate vehicles. Deputy Looney pulled onto the grass median to observe passing traffic. Deputy Cox continued farther north and stopped at the sight of a recent accident. Deputy Looney soon spotted a truck traveling northward that matched the description of the stolen vehicle but, contrary to the report, was towing a trailer loaded with two personal watercraft. Looney reported his sighting on his radio and began to follow the truck. After hearing Looney's report of his observation, Deputy Cox radioed Looney to inform him that there was an accident scene north of his position

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[1] There are several important disputes between the parties as to what transpired in the period prior to the shooting. As is our obligation at the summary judgment stage, we will resolve all disputes in favor of Vaughan's version of events.

and that he should not attempt to stop the vehicle until it had passed by the accident.

As the red pickup and Deputy Looney passed him, Deputy Cox pulled out and joined the pursuit. While tracking the truck, the deputies made efforts to determine whether the vehicle was indeed the stolen truck. To this end, Deputy Cox sped up and passed the truck, which was proceeding at or near the speed limit. He observed two men in the cab. The man in the passenger's seat, Mr. Vaughan, matched the description of the suspect. Cox's suspicions confirmed, he and Deputy Looney decided to use a "rolling roadblock" to stop the vehicle, which involves officers blocking a suspect vehicle with their police cars and reducing speed, in the hope that the suspect car will slow down as well. Deputy Looney positioned his cruiser directly behind the pickup. Deputy Cox moved in front of the truck. Vaughan has conceded that by this point the deputies had made it clear that they desired to stop the pickup. As soon as he had positioned his vehicle in front of the truck, Deputy Cox applied his brakes. The truck rammed into the back of Cox's cruiser. Deputy Cox has testified that the impact caused him to momentarily lose control; Vaughan and the pickup's driver, Freddy Rayson, however, contend that the impact was both accidental and insufficient to cause Cox to lose control.

Rayson did not pull over following the collision, but instead accelerated while staying in the same lane of

traffic.[2] Deputy Cox decided to reposition his vehicle behind the truck. He unholstered his sidearm and rolled down the passenger side window. Cox testified that he readied himself in this manner in case Rayson made aggressive moves in his direction. Cox then shifted his cruiser one lane to the left and slowed to allow the truck to pass by him. As soon as his cruiser was even with the pickup, Deputy Cox turned on his rooftop lights. Rayson responded by accelerating to eighty or eighty-five miles per hour. Cox then fired three rounds into the truck. It is undisputed that Deputy Cox did not warn the truck's occupants before he used his weapon. Cox testified that he fired because the pickup swerved as if to smash into his cruiser. Vaughan maintains that the truck, while increasing its speed, made no motion in the direction of Cox's vehicle and the shooting was unprovoked.

Deputy Cox's plan was to disable either the truck or Rayson so that he could force the truck off the road. However, his volley disabled neither the truck nor Rayson. The third bullet fired from Cox's weapon instead punctured Vaughan's spine, paralyzing him instantly below the chest. Rayson's only reaction to the shooting was to drive faster and more recklessly.[3] As the chase

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[2] On cross-examination, Vaughan conceded that Rayson began to drive "recklessly" after the collision with Cox's vehicle. However, Vaughan maintains that while Rayson did accelerate, he did not change lanes or weave in and out of traffic.

[3] After the shooting, Rayson began a desperate break for freedom which involved weaving in and out of lanes, driving at highway speeds through exit ramps, and dragging at least one of the watercraft, which had fallen off the trailer, along the ground.

continued into more heavily congested sections of the highway, Cox made several more attempts to stop the vehicle, firing his weapon once more. After an extended chase, the pickup struck the cement median and came to a stop. Vaughan was removed from the truck and taken to a hospital.

Vaughan filed suit for damages pursuant to 42 U.S.C. § 1983 in the Northern District of Georgia against Deputy Cox in his individual and official capacities, Coweta County, and Coweta County Sheriff Mike Yeager in his official capacity. Vaughan's complaint alleges that: (1) Deputy Cox violated one or more of the Fourth, Fifth, Eighth, and Fourteenth Amendments in using excessive force in his attempt to stop the pickup; (2) Sheriff Yeager promulgated and established policies that caused Deputy Cox to violate Vaughan's rights; and (3) Cox's actions also constituted "negligence, assault and battery, false arrest, intentional infliction of emotional distress[,] and outrageous conduct" under Georgia law. (R.1-1 at 6.) The defendants moved for summary judgment. In analyzing Vaughan's federal claims, the court first determined that since Vaughan alleged that Cox used excessive force, a Fourth Amendment analysis should be applied. The district court thereafter found that: (1) Vaughan was not "seized" within the meaning of the Fourth Amendment by Cox's bullet; and (2) even if Vaughan had been seized by the bullet that hit him in the spine, the use of force was reasonable given the circumstances. Because it found that no constitutional violation had occurred, the court granted the defendants summary judgment and declined

to exercise supplemental jurisdiction over the state law claims.[4] Vaughan appeals.

Issues on Appeal

Vaughan argues on appeal that: (1) the district court erred in finding that he was not seized when shot by Deputy Cox; (2) issues of fact remain as to whether Cox's actions were objectively reasonable; and (3) even assuming that no seizure occurred, he still has a valid Fourteenth Amendment substantive due process claim based on Cox's deliberately indifferent and conscience-shocking conduct. We review a district court's grant of summary judgment de novo, drawing all inferences in favor of the nonmoving party. *See Korman v. HBC Fla., Inc.*, 182 F.3d 1291, 1293 (11th Cir. 1999). We will address each of the issues raised by Vaughan in turn.

Discussion

The first step in reviewing an excessive force claim is to determine whether the plaintiff was subject to the "intentional acquisition of physical control" by a government actor. *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S. Ct. 1378, 1381 (1989). It is clear that "apprehension by the use of deadly force is a seizure. . . . " *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 1699 (1985). It is also apparent that Vaughan could have been "seized" for Fourth Amendment purposes even though he was not

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[4] Vaughan has raised no arguments on appeal regarding the district court's decision not to exercise jurisdiction over his state law claims.

taken into custody immediately following the shooting. As the Supreme Court has noted, "the application of physical force to restrain movement, even when it is ultimately unsuccessful" is sufficient to constitute a seizure. *California v. Hodari D*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1550 (1991). Undeniably, Cox's firing of his weapon was an application of force with the design to restrain movement. It is therefore irrelevant that Vaughan was not actually taken into custody until after the lengthy chase. However, the Supreme Court has held that a seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower*, 489 U.S. at 597, 109 S. Ct. at 1381 (emphasis in original). The question remains whether Cox's action in firing his weapon at the truck can be deemed "means intentionally applied" to seize Vaughan.

The district court concluded, and Deputy Cox contends here, that Vaughan was not seized by the bullet because Cox did not intend to hit Vaughan when he fired his pistol. Instead, Cox planned to seize both Rayson and Vaughan by disabling the truck or Rayson with a volley of bullets and then ramming the pickup off the road. Cox argues that Vaughan was not seized because Cox, while intending to apprehend Vaughan, did not intend to stop him by shooting him.[5] In Deputy Cox's view, a seizure

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[5] In support of this position, Deputy Cox cites several cases from our sister circuits where courts rejected Fourth Amendment claims brought by innocent bystanders or hostages accidentally harmed by police fire. *See Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991) (bystander not seized by police bullet aimed at fleeing vehicle); *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000) (hostage wounded by police bullet

can only occur when an officer stops a suspect using the specific means that he intended. Because Cox did not intend to shoot Vaughan, he contends that Vaughan did not suffer a Fourth Amendment seizure. We disagree.

The Supreme Court has cautioned against a too finely drawn reading of "means intentionally applied." *Brower*, 489 U.S. at 598, 109 S. Ct. at 1382. It is not necessary for the means by which a suspect is seized to conform exactly to the means intended by the officer. Otherwise courts could be compelled to conclude that "one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg." *Id.* at 598-99, 109 S. Ct. at 1382. Instead, the Court has held that it is enough "that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* That standard has been met in this case. Cox fired his weapon to stop Vaughan and Rayson; Vaughan was struck by one of those bullets. Because Vaughan was hit by a bullet that was meant to stop him, he was subject to a Fourth Amendment seizure. We therefore must turn to the question of whether the seizure could be found "unreasonable."

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aimed at suspect not seized); *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir. 1998) (same); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (same). These cases are of little aid to our inquiry, however, because Vaughan was neither an innocent bystander nor a hostage; instead, he was a suspect whom Deputy Cox sought to apprehend.

A police officer may use deadly force to seize a fleeing felony[6] suspect when the officer: (1) "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others" or "that he has committed a crime involving the infliction or threatened infliction of serious physical harm;" (2) reasonably believes that the use of deadly force was necessary to prevent escape; *and* (3) has given some warning about the possible use of deadly force, if feasible. *Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701; *Acoff v. Abston*, 762 F.2d 1543, 1547 (11th Cir. 1985). We review an officer's use of force "from the perspective of a reasonable officer on the scene," taking care to make allowances "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S. Ct. 1865, 1872 (1989). It is undisputed that Deputy Cox had no reason to believe that Vaughan or Rayson had committed a crime involving the infliction or threatened infliction of physical harm. Therefore, our inquiry is limited to whether a reasonable officer: (1) would have had probable cause to believe that the Vaughan and Rayson's unabated flight posed an immediate threat of serious harm to Deputy Cox, other police officers, or innocent motorists; (2) would have believed that deadly force was necessary to stop the suspects; and (3) would have concluded that it was not

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[6] There is no dispute that Vaughan was a suspect in at least one felony.

feasible to warn the suspects of the possible use of deadly force. *See Acoff*, 762 F.2d at 1547.

Resolving all evidentiary disputes in Vaughan's favor, we conclude that a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup. First, material issues of fact remain as to whether Vaughan and Rayson's continued escape presented an immediate threat of serious harm to Cox or others. Assuming Vaughan's version of events, it is not clear that Looney or Cox were in immediate danger from the suspects at the time of the shooting, nor does the record reflect that the suspects had or were likely to menace other innocent drivers.[7] What Deputy Cox was faced with at the time he fired his weapon was simply two suspects who were evading arrest and had accelerated to eighty or eighty-five miles per hour in an attempt to avoid capture. Under such facts, a reasonable jury could find that Vaughan and Rayson's escape did not present an immediate threat of serious harm to Cox or others on the road.[8]

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[7] According to Vaughan, the pick-up's lane was clear of traffic and Rayson made no moves to change lanes before Cox fired.

[8] In support of his position, Cox cites three cases from our sister circuits in which courts found the application of deadly force in a high-speed chase to be reasonable as a matter of law. However, the facts of the cited cases diverge significantly from the case at bar. In *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), a suspect led an officer on a "wild chase at speeds in excess of ninety miles per hour," attempted to ram the officer's car twice, and drove around a police blockade at high speed in an effort to avoid arrest. 954 F.2d at 344. The officer eventually cornered the suspect in a dead-end street, blocking the suspect's vehicle with his police car. *See id.* After the officer exited his vehicle to make

Second, a reasonable jury could find that it was feasible for Cox to warn the truck's occupants of the potential

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an arrest, the suspect smashed his car into the officer's cruiser and made yet another a break for freedom. *See id.* It was only at this point that the officer used deadly force to prevent the suspect's escape. *See id.* The Sixth Circuit concluded that the officer's use of deadly force was justified given that the suspect had demonstrated that he posed a major threat to other officers and the public. *Id.* at 347.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), a suspect driving an eighteen-wheel tractor trailer led the police on a lengthy highway chase at speeds exceeding ninety miles per hour. 993 F.2d at 1330. The suspect thwarted multiple efforts to establish a rolling roadblock, ran through a stationary roadblock, refused to stop after the police had shot out two of the truck's tires, and forced more than one hundred innocent motorists off the road. *See id.* at 1330-31. During the chase, the pursuing officers were continuously compelled to take measures in order to stop the suspect from hitting both police and civilian vehicles on a crowded highway. *See id.* at 1331. After multiple attempts to stop the truck using other means had failed, one of the pursuing officers shot twice at the truck, hoping to disable its engine. *See id.* The suspect was fatally wounded by the second shot. *See id.* The court held that, in light of all the information available to the officer, it was reasonable for the officer to conclude that the suspect posed an imminent threat of serious harm. *See id.* at 1333.

Finally, in *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000), the police began pursuing a suspect who had raced through an intersection in contravention of a stop sign. 205 F.3d at 871. Rather than stop for the police, the suspect led them on a twenty-minute chase over rural roads at speeds ranging from eighty-five to one hundred miles per hour. *See id.* at 872. The driver testified that he forced at least one motorist off the road during the chase. *See id.* After the suspect's vehicle crashed into a guardrail and came to a stop, one of the pursuing officers parked and exited his cruiser to make an arrest. *See id.* The suspect's vehicle rapidly accelerated in the officer's direction,

application of deadly force. According to Vaughan's version of events, Cox pulled his cruiser parallel to the truck, turned his rooftop lights on and waited for thirty to forty-five seconds before firing his weapon. A reasonable jury could therefore conclude that Cox had the time and opportunity to warn Vaughan and Rayson that he was planning to use deadly force before he opened fire.

Although we are loathe to second-guess the decisions made by police officers in the field, we simply cannot conclude as a matter of law that a reasonable jury could not find that Deputy Cox's actions were objectively unreasonable. We note again that Deputy Cox disputes much of Vaughan's description of the events leading up to the shooting. For example, Cox maintains that the suspects rammed his vehicle, not once but twice and swerved as if to run him off the road before Cox fired his weapon. These assertions, if proven, would establish that Vaughan and Rayson represented a threat to Cox or others on the road and suggest that it was not feasible for Cox to give the truck's occupants prior warning. However, our obligation at this stage of the proceeding is to

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forcing the officer to leap out of the way to avoid being struck. *See id.* As the suspect sped at another police vehicle that was approaching the scene, the officer fired his weapon to stop the suspect's escape. *See id.* In holding that the officer acted reasonably in applying deadly force, the Sixth Circuit concluded that the record demonstrated that the suspect's "ongoing felonious misconduct posed an immediate threat to the safety of officers as well as innocent civilians." *Id.* at 877. Unlike the situations presented in *Smith*, *Cole*, or *Scott*, it is less clear in the instant case that Vaughan and Rayson presented a immediate threat of serious harm to the pursuing officers or other motorists.

view all of the evidence in the light most favorable to Vaughan. Under this standard, genuine issues of material fact exist as to whether the suspects' flight was likely to endanger others on the road and whether Cox had the opportunity to warn Vaughan and Rayson before firing. Accordingly the district court erred in granting the defendants summary judgment on the basis that no Fourth Amendment violation occurred.

Qualified Immunity

We now turn to the question of whether Deputy Cox should be shielded from suit based on qualified immunity. As noted above, an officer is required to have probable cause to believe either that a suspect committed a crime involving the infliction or threatened infliction of serious harm or that the suspect presents a threat of serious physical harm before the officer can use deadly force. *See Garner,* 471 U.S. at 11, 12, 105 S. Ct. at 1701. The standard for resolving whether an officer who did not have the requisite probable cause to use deadly force should still be entitled to qualified immunity against suit is similar yet distinct. *See Saucier v. Katz,* ___ U.S. ___, 121 S. Ct. 2151, 2158 (2001). Under that standard, an officer will be entitled to qualified immunity if he had " 'arguable probable cause' " that the suspect either had committed a violent crime or presented a threat of serious harm. *Montoute v. Carr,* 114 F.3d 181, 184 (11th Cir. 1997). To find arguable probable cause, we must conclude that "the officer reasonably could have believed that probable cause existed." *Id.* We apply an objective standard, asking "whether the officer's actions are objectively reasonable

in light of the facts confronting the officer, regardless of the officer's underlying intent or motivation." *Id.* at 183.

We conclude that a reasonable officer in Deputy Cox's position could have believed that he had sufficient probable cause to apply deadly force. At the time he fired his weapon, Cox had clearly demonstrated to the truck's occupants that he wanted them to stop and had seen the driver instead speed up to avoid apprehension. A reasonable officer in Cox's position could have concluded that the suspects, who were fleeing down a major highway at approximately eighty to eighty-five miles per hour in a pickup towing a trailer laden with two personal watercraft and apparently were not about to stop, posed a serious threat of harm to other motorists. Therefore, while a reasonable jury could find that Deputy Cox was mistaken in his belief that he had probable cause to use deadly force, we cannot say that a reasonable officer in Cox's position could not have believed that such probable cause existed.

We also conclude that the law was not sufficiently established on the day of the shooting that Deputy Cox knew that he needed to warn the occupants of the truck before firing his weapon. Qualified immunity provides complete protection for government officials sued in their individual capacities as long as "their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Lassiter v. Ala. A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). The law will not be deemed "clearly established" unless it was developed at the time of the alleged violation "in such a concrete and factually

defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987)). The pre-existing law must "truly compel (not just suggest or allow or raise a question about)" the conclusion that "what defendant is doing violates federal law *in the circumstances.*" *Id.* at 1150 (emphasis in original).

As noted above, the Supreme Court has held that a police officer must warn a suspect of the potential application of deadly force "where feasible." *See Garner*, 471 U.S. at 11-12, 105 S. Ct. at 1701. However, aside from establishing a broad mandate to provide some form of warning, the *Garner* Court made no effort to define under what factual situations such a warning would be necessary. Nor has the Supreme Court, this court, or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case. *See Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996) (law can be clearly established in this circuit only by decisions of the U.S. Supreme Court, this court, or the highest court of the state from which the case arose). In short, the law was not defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson. Accordingly, we affirm the district court's grant of summary judgment to Deputy Cox because he is protected by qualified immunity.

Substantive Due Process

We also conclude that Vaughan's alternative substantive- due-process claim based on Cox's alleged deliberately indifferent and conscience-shocking conduct lacks merit. The Supreme Court has held that in cases where police officers are required to make quick judgments about the proper course of action and therefore cannot deliberate before acting, even a showing that the officer's recklessness caused the plaintiff's injury is insufficient to support a substantive-due-process claim. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853-54, 118 S. Ct. 1708, 1720 (1998). Instead, a violation of substantive due process will be found only when a plaintiff can show that the officer had "a purpose to cause harm unrelated to the legitimate object of arrest. . . . " *Id.* at 836, 118 S. Ct. at 1711. Vaughan has not presented any evidence to suggest that Cox's actions were motivated by anything but the desire to arrest Rayson and Vaughan. Accordingly, we affirm the grant of summary judgment to all defendants on Vaughan's substantive due process claim.

Conclusion

While we conclude that a reasonable jury could find that Deputy Cox's shooting of Vaughan was an unreasonable seizure and therefore unconstitutional, we affirm on qualified immunity grounds the district court's grant of summary judgment to Cox on Vaughan's individual-capacity claim. We similarly affirm the grant of summary judgment to all defendants on Vaughan's alternative Fourteenth Amendment substantive-due-process claim. Because it found that no constitutional violation had

occurred, the district court did not address whether a viable official capacity action could be brought against Deputy Cox or Sheriff Yeager, as well as whether the County could be held liable for Cox's actions.[9] We therefore vacate the judgments in favor of Cox and Yeager in their official capacity and the judgment in favor of the County and remand for the district court to address these issues in the first instance.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

NOONAN, Circuit Judge, dissenting:

Fred Lawrence Cox, an officer of the Coweta County Sheriff's Department in Coweta County, Georgia, drew his police cruiser parallel to a suspected thief driving a pickup on I-85, waited between thirty and forty-five seconds and then, having rolled down his window, discharged three rounds into the front seat of the pickup, wounding Jerry Charles Vaughan and paralyzing him for life.

The majority is of the opinion that Deputy Cox violated Vaughan's right under the Fourth Amendment to be free of unreasonable seizure by an agent of the state. The majority is also of the opinion that Cox had time to warn the occupants of the pickup that he would shoot if they didn't stop. But the majority holds as a matter of law that Cox would not have reasonably known that his shots

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[9] The parties disagree as to whether Sheriff Yeager is an officer of the County or an officer of the State of Georgia. It is not clear what entity is sued in Vaughan's official-capacity claims against Cox and Yeager.

were in violation of human rights secured by our Bill of Rights and made binding on the states by the Fourteenth Amendment.

Cox as a reasonable police officer is presumed to be familiar with *Tennessee v. Garner*, 471 U.S. 1 (1985). He, therefore, knew:

1. That it is an unconstitutional use of force to shoot a residential burglar without warning, even if it is at night and the thief has a good chance of escaping. *Id.* at 4.

2. That such police behavior violates the Fourth Amendment even though a state statute authorizes the behavior. *Id.* at 5.

3. That such police behavior is unreasonable even though the police officer has to make a "difficult," even "split second" evaluation of "unknowable facts." *Id.* at 20.

Deputy Cox had particular reason to be acquainted with the appropriate standard because only four months before he shot Vaughan he had conducted a high speed chase of a pickup truck driven by a suspected burglar and then discharged his firearm into the pickup, wounding its passenger. It can scarcely have escaped the notice of his superiors or his own conscience that there were constitutional standards that govern the use of deadly force to seize a thief.

The majority says the Supreme Court has not established the circumstances under which a police officer will find it feasible to give a warning before he shoots. Au contraire, *Tennessee v. Garner* has very clearly established that it is feasible to give a warning if the officer has time before he shoots, has no reason to believe that the suspect

will shoot or otherwise injure him, and the reason for seizing the suspect by shooting is simply to prevent his escape.

Tennessee v. Garner, supra, was applied by the Second Circuit to a Waterbury, Connecticut policeman shooting an escaped felon without warning. *Davis v. Little,* 851 F.2d 605, 608 (2d Cir. 1988). *Garner* was not only applied but applied retroactively; the police shooting had occurred in 1981. *Id.* at 609. If a policeman in Connecticut in 1981 should have known what the constitution required, should not a policeman in Georgia in 1998?

Garner was a guide to the constitutionality of St. Paul, Minnesota police shooting a mentally disturbed man armed with a knife and engaged in bizarre behavior. *Ludwig v. Anderson,* 54 F.3d 465, 471 (8th Cir. 1995). The court noted the Supreme Court's words that a seizure by deadly force was "unmatched" in its intrusiveness on the human person and "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." *Id.* at 471 (quoting *Garner,* 471 U.S. at 9). The policeman is not to be both judge and executioner. The court noted the Supreme Court's teaching, "It is not better that all felony suspects die than that they escape." *Id.* (quoting *Garner,* 471 U.S. at 11). Law enforcement is not the supreme value. If these messages should have guided the police in Minnesota in a situation factually different from the apprehension of a thief at night, should they not have been equally clear to Deputy Cox?

To be sure, Cox's case is not on all fours with that of Memphis Police Officer Elton Hymon of *Tennessee v.*

Garner. Few cases are on all fours with each other. Constitutional rights would be at the mercy of uncontrolled police if close factual similarity were required. The test, however, is not whether "the very action in question has previously been held unlawful," but whether, "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). If it was unlawful in 1985 for a Memphis policeman to shoot without warning a suspected burglar fleeing at night, it was known to any reasonable Coweta County, Georgia sheriff's deputy in 1998 that it was contrary to the constitution of the United States to shoot three times in broad daylight into a vehicle carrying two human beings, who were probably thieves in flight but who certainly had lives more valuable than the property the policeman was so dangerously and so stupidly and so unconstitutionally seeking to protect.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JERRY CHARLES VAUGHAN, Plaintiff v. OFFICER FRED LAWRENCE COX, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA; and SHERIFF MIKE YEAGER, in his official capacity as Sheriff of Coweta County, Defendants	CIVIL ACTION NO. 3:99-CV-006-JTC

ORDER

This case is before the Court on Defendants' Motion for Summary Judgment [#16-1], Motion to Supplement Plaintiff's Response to Defendants' Motion for Summary Judgment [#28-1], and Defendants' Motion to Exclude Plaintiff's Use of an Undisclosed Expert Witness [#30-1].

I. BACKGROUND

During a high speed police chase on Interstate 85 during rush hour on the morning of January 5, 1998, Plaintiff Jerry Charles Vaughan was hit by a bullet fired by Defendant Deputy Fred Lawrence Cox into the fleeing

truck in which Vaughan was a passenger. As a result of this gunshot wound in his back, Plaintiff was immediately paralyzed from the chest down. Plaintiff has brought the instant suit against Deputy Cox, as well as Coweta County and Sheriff Yeager, arising out of this incident. Plaintiff claims that his Fourth Amendment rights were violated by Deputy Cox's use of excessive force on the morning in question and seeks recovery under 42 U.S.C. § 1983 and Georgia state law.

Following extensions of the discovery period and of the time limitations for filing dispositive motions, Defendants moved for summary judgment on all of Plaintiff's claims against them. After receiving one extension of time in which to respond, Plaintiff opposed Defendants' motion. Approximately six weeks after the filing of this opposition and after the close of briefing on the summary judgment motion, Plaintiff moved to supplement his response to Defendants' motion by adding the affidavit of an additional fact witness, as well as the affidavit testimony of a second expert witness. Defendants vigorously oppose Plaintiff's attempt to supplement his summary judgment opposition and have filed a motion seeking to exclude the opinion of the second and previously undisclosed expert witness.

II. SUMMARY JUDGMENT

A. Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The district court should 'resolve all reasonable doubts about the facts in favor of the non-movant,' . . . and draw 'all justifiable inferences . . . in his favor. . . . ' " *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991).

The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An award of summary judgment requires that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or not significantly probative." *Id.* at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the non-moving party's case. *Id.* at 248.

In a case like this one, where the non-moving party will bear the burden of proof at trial, the movant may prevail by establishing that the non-moving party has no evidence to support an essential element of its case or by presenting affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial. *Young v. City of Augusta*, 59 F.3d 1160, 1170 (11th Cir. 1995).

B. The Fourth Amendment

Plaintiff Vaughan claims that the Defendant Cox violated his rights pursuant to § 1983 by employing excessive and unreasonable force in firing shots at the fleeing

truck in which he was a passenger. The Supreme Court has found that "all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard.' " *Graham v. Connor*, 490 U.S. 386, 395 (1989). The Fourth Amendment to the United States Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a "careful balancing of 'the nature and quality of the intrusion on the individuals' Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989). In connection with this balancing, the law has long recognized that the right to make an arrest necessarily carries with it the right to use some degree of physical coercion. *Id.*

There is no precise definition or mechanical formula, however, that can be used to determine the appropriate balance between the interests at stake with respect to a particular use of force. Instead, the Fourth Amendment test of "reasonableness" requires consideration of the facts and circumstances involved in each case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Tennessee*

v. Garner, 471 U.S. 1, 8-9 (1985) (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.")).

The "reasonableness of a particular use of force must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citations omitted). With respect to a claim of excessive force, not every push or shove, even if it may later seem to have been unnecessary, violates the Fourth Amendment. *Id.* "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* Therefore, the question is whether an officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them without regard to their underlying intent or motivation. *Id.* at 397.

With respect to the use of deadly force such as Officer Cox employed in this case, the Supreme Court has explained:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction of serious physical harm or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Tennessee v. Garner, 471 U.S. 1, 11-12 (1985); *see also Acoff v. Abston*, 762 F.2d 1543, 1547 (11th Cir. 1985) (discussing circumstances in which use of deadly force is constitutionally reasonable). The Constitution does not require law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used; "where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first . . . " *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1148-50 (7th Cir. 1994)).

C. The Incident

At approximately 7:30 on the morning of January 5, 1998, Plaintiff Jerry Charles Vaughan was a passenger in a red Z-71 Chevrolet truck with a silver toolbox attached to the bed.[1] The truck was traveling north on I-85 from the Newnan area in the direction of Atlanta. The truck was hauling a trailer with two wave runners on it.

At the same time, the Coweta County Sheriff's Department received a call that a truck had been stolen from a gas station just off I-85 in Hogansville, Georgia. The stolen truck was described as a red Chevrolet Z-71 with a silver toolbox attached to the front portion of the truck's bed. It was believed to be heading north on I-85

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[1] Consistent with the standards applicable to Defendant's motion for summary judgment, the facts set forth herein are either undisputed or viewed in a light most favorable to Plaintiff.

toward Atlanta. The truck's thief was described to police as a white male wearing a white shirt.

Having heard this stolen vehicle report, Defendant Deputy Fred Cox of the Coweta County Sheriff's department and Deputy Jeff Looney headed to I-85 in separate marked patrol cars. Soon thereafter, Defendant Cox began working a crash on the interstate. Deputy Looney pulled into the grassy median of I-85 to monitor traffic. Deputy Looney soon observed a red Chevy truck with a silver toolbox matching the description of the stolen vehicle report traveling north on the interstate. Deputy Looney pulled onto the interstate and followed the truck, while reporting his observations over the police radio.

The truck and Deputy Looney were heading toward the location where Deputy Cox was working the crash. Having heard Deputy Looney's report about the stolen truck over the radio, Deputy Cox radioed Looney and informed him that there was an accident up ahead of him and suggested that he wait to make any move with respect to the truck until after they had passed this accident to avoid any dangerous condition involving the stolen truck and the motorists involved in the crash.

When Deputy Looney and the red truck passed Deputy Cox on the interstate, he pulled out behind them and pursued the truck, leaving the accident site. Because the stolen vehicle report had not provided the deputies with a tag number and because it had not mentioned wave runners on the back of the truck, the deputies sought to confirm that the red truck matched the description of the stolen vehicle. Upon speeding up and passing the truck on the driver's side, Deputy Cox noted that the passenger

was a white male wearing a white shirt and fit the description of the perpetrator of the theft of the truck.

After reporting this observation to Deputy Looney over the radio, Deputy Cox passed the truck and positioned his patrol car directly in front of it. At this point, Deputy Cox's vehicle was positioned directly in front of the red truck with Deputy Looney following directly behind it. Both deputies testified in deposition that they activated their blue lights at this time in an effort to direct the truck to pull over. While Plaintiff disputes this fact and claims that neither officer activated his blue lights at this point, Plaintiff concedes that the officers made it clear by their actions that they were directing the truck to pull over. (Vaughan Deposition pp. 72, 75, 76, 80-81, 90). It is also undisputed that the truck did not pull over at that time in response to the deputies' actions. *Id.*

According to Deputy Cox, the truck sped up and tried to elude him instead of complying with his commands to pull over. Deputy Cox testified that the truck then rammed the back of his patrol car two times. At a speed of approximately 70 miles per hour, the impact from these collisions caused Deputy Cox to fight to maintain control of his car according to Cox. In addition, Deputy Cox maintains that the force of this collision caused at least one of the wave runners on the trailer attached to the truck to be catapulted off the trailer and to bounce dangerously along the interstate at a high rate of speed.

In his deposition, Plaintiff denied that the driver of the truck intentionally struck the patrol car riding in front of him. Rather, Plaintiff testified that the truck struck the

car after the deputy applies his brakes, causing the car to slow and the truck to collide with it.[2] Further, Plaintiff disputes that the wave runner became detached from the trailer following this initial impact, claiming instead that the wave runner was dislodged later in the chase.

Regardless of these inconsistencies that do exist between Plaintiff's testimony and that of the deputies pursuing the truck on that morning, it is undisputed that the red truck matching the description of the stolen truck made contact with Deputy Cox's marked patrol car at a high rate of speed after Deputy Cox and Deputy Looney signaled the truck to stop. It is also undisputed that the truck sped up and began driving recklessly following this impact in an effort to elude the officers. (Vaughan Deposition pp. 86-87, 90).

At this point, Deputy Cox decided to reposition his patrol car from the front to the back of the truck. Deputy Cox testified in deposition that he made this decision in an effort to extract himself from what he considered to be a life threatening situation driving in front of the truck that had just made contact with his car at approximately 70 miles per hour. Deputy Cox testified that he unholstered his gun and unrolled the passenger window of his vehicle before maneuvering his car to the left of the truck and slowing down to allow it to pass him. He explained that he did this to defend himself against the

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[2] The Court notes that Plaintiff's testimony regarding the officer's application of his brakes is consistent with the officer's testimony that he and Deputy Looney were using a rolling road block in an effort to slow the truck to a more moderate speed and effect a stop.

possibility that the speeding truck would make further aggressive moves in his direction.

While dropping back behind the truck and parallel to the truck on the driver's side, Deputy Cox fired three rounds from his gun at the truck. The deputy testified that he fired these shots in response to the truck's attempt to veer in the direction of his vehicle and side swipe his patrol car. Deputy Cox testified that he was aiming his gun at the truck or the driver in an effort to stop the truck and eliminate the threat of danger to himself and other drivers on the road during the morning rush hour.

While Plaintiff concedes that the driver of the truck was driving recklessly at this point in time, Plaintiff denies that the truck made any aggressive move toward the patrol car while Deputy Cox was attempting to reposition himself behind the truck. Plaintiff claims that he put both of his hands out the passenger window of the truck in an attempt to demonstrate his surrender both before and after the initial shots were fired. Plaintiff claims that he was struck in the spine by the last bullet fired in this round of shots and immediately paralyzed.

Unfortunately, the chase did not end there. In a continued effort to avoid the police, the truck recklessly weaved in and out of traffic, colliding with other motorists in the process. The truck pulled off of exit 10 and proceeded through a busy intersection without slowing down – again colliding with innocent motorists on the road during the morning rush hour. At this point, both Parties agree that at least one of the wave runners had become detached from the trailer and was bouncing along the road behind the truck. The truck, with the

deputies in pursuit, proceeded to drive back onto the interstate heading north toward Atlanta.

Given his concern for the lives of innocent motorists, especially in light of the heavier traffic as the chase approached the Atlanta area, Deputy Cox testified that he decided to attempt to get in front of the truck again. Cox again drew his weapon as he passed. Although Cox claims that the truck veered dangerously toward him on his first attempt to pass it, he testified that he dropped back behind the truck without firing his weapon because the chase was approaching Southern State Auto Auction where he feared people would be located. During his next attempt to pass the truck, Deputy Cox testified that he fired his weapon to defend against aggressive maneuvering by the truck. Again, Deputy Cox was forced to drop back behind the truck.

When Deputy Cox was finally able to get to the front of the truck after it slowed in an apparent effort to surrender, the truck struck his patrol car again, causing him to spin out of control and ram into a steel guard rail at approximately 70 miles per hour. Deputy Cox was injured and his car was severely damaged.

Following this collision, the truck continued toward Atlanta dragging the trailer and wave runner. Finally, as the truck was trying to force its way between two vehicles traveling on the interstate, the driver lost control and the trailer jack knifed causing the truck to hit the cement median wall head on and eject the driver. Plaintiff was found in the car and was transported to a hospital for treatment due to his injuries. The driver of the truck also

was taken to the hospital from which he escaped the next day.

Investigation revealed that the red truck in which Plaintiff was traveling was indeed the truck stolen from the Hogansville gas station earlier that morning. Both Plaintiff and the driver of the truck were charged with aggravated assault, fleeing and theft by taking. As of the time that Defendant's summary judgment motion was filed, the charges against Plaintiff remained pending.

D. Analysis

The first issue to be addressed by the Court in analyzing Defendants' motion is whether Plaintiff was subject to a "seizure" within the meaning of the Fourth Amendment when Deputy Cox shot him.

A "seizure" occurs within the meaning of the Fourth Amendment when there is a governmental application of physical force or, where that is absent, a show of authority to which the subject yields. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991). The Fourth Amendment addresses only the " 'misuse of power,' not the accidental effects of otherwise lawful governmental conduct." *Brower v. County of Invo*, 489 U.S. 593, 596 (1989) (citations omitted). Thus, it is clear that a Fourth Amendment seizure does not occur whenever there is a "governmentally caused termination of an individual's freedom of movement, nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement, but only when there is a governmental termination of freedom of movement **through means intentionally applied.**" *Id.* at 596-97.

The intentional shooting of a suspect by police is considered a "seizure" within the meaning of the Fourth Amendment. *See e.g., Menuel v. City of Atlanta*, 25 F.3d 990, 994-995 (11th Cir. 1994) (intransigent suspect was seized upon fatal shooting). In situations where a shooting is the accidental effect of intentional governmental conduct, however, courts have found no seizure as required by the Fourth Amendment. In *Puglise v. Cobb County, Georgia*, 4 F. Supp.2d 1172, 1179 (N.D. Ga. 1998) (Story, J.), a passenger in a pickup truck was shot twice during a high speed chase with police. In an effort to halt the fleeing truck and defend against aggressive maneuvers by the truck, police fired a total of 54 rounds of ammunition during the chase, including some shots after the truck came to a halt. *Id.* 1177. The plaintiff passenger was hit by two of the bullets fired. *Id.*

Although the court found that the driver of the truck unquestionably was seized when the defendant officers fired shots to stop his flight and to defend against his actions, the court found that the passenger was not seized within the meaning of the Fourth Amendment when he was shot because the shooting of the passenger was "not the result of means intentionally applied to him." *Id.* at 1179. Accordingly, the court found no seizure to which Fourth Amendment protections were applicable until the passenger was physically removed from the truck and arrested. *Id.; see also Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 793-95 (1st Cir. 1990) (holding that hostage injured by police attempting to stop fleeing felon was not "seized" and could assert no Fourth Amendment claim: "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim.").

Similarly, in this case, Deputy Cox testified that he fired shots at the truck and its driver in an effort to halt its perilous progress and to fend off offensive tactics by the driver. (Cox Deposition pp. 52-53). Although Cox testified that he considered the passenger as a suspect in the theft of the truck just like the driver, his testimony was unequivocal and undisputed that he fired shots aimed at the driver of the truck or the truck itself in order to end the truck's flight. Under these circumstances, therefore, the inadvertent shooting of Plaintiff was not the result of means intentionally applied to him. Like the passenger in *Puglise*, Plaintiff was not "seized" within the meaning of the Fourth Amendment when Deputy Cox's bullet found him during the heated chase. Based upon this fact alone, Defendants are entitled to summary judgment with respect to Plaintiff's § 1983 claim.

Even assuming that Plaintiff suffered a seizure under the Fourth Amendment when he was shot during the chase, Deputy Cox's use of force during the high speed chase was objectively reasonable under the circumstances as a matter of law. Plaintiff disputes the testimony of both officers initially involved in the pursuit of the stolen truck that the officers activated their blue lights upon taking up positions directly in front of and behind the stolen vehicle. This dispute is not material for purposes of summary judgment, however, because Plaintiff concedes that the officers' actions – whether they activated their blue lights or not – made it clear that they were directing the truck to pull over. Plaintiff concedes that the driver of the truck made no effort to pull over at this time.

Plaintiff also disputes the testimony of Deputy Cox that the truck purposely rammed his vehicle twice from behind in an effort to elude the officers. Rather, Plaintiff testified that the truck rammed the patrol car after the officer applied his brakes because of the high rate of speed at which the vehicles were traveling and the close proximity of the policy car to the truck. The Court notes that this version of events is somewhat consistent with Deputy Cox's testimony that he and Deputy Looney were using a rolling road block in an effort slow the fleeing truck's speed. (Cox Deposition p. 41). Again, this dispute does not relate to a fact material to the resolution of Plaintiff's Fourth Amendment claims against Deputy Cox and the County. Regardless of the exact reason for the collision, it is undisputed that the stolen truck hit Deputy Cox's patrol car at a speed of approximately 70 miles per hour after demonstrating its refusal to heed the officers' directions to stop.

In addition, Plaintiff disputes the testimony of Deputy Cox that the stolen truck purposely swerved in his direction in an effort to side swipe him as he attempted to drop back behind the truck. Plaintiff readily concedes, however, that the truck was driving in a reckless manner after the initial collision with Deputy Cox.

Accordingly, it is undisputed that Deputies Cox and Looney had probable cause to believe that the truck in which Plaintiff was a passenger was the truck reported stolen that morning. Indeed, it is undisputed that the truck in which Plaintiff was a passenger was in fact the stolen truck in question. Further, it is undisputed that Deputy Cox and Deputy Looney clearly indicated their

desire that the truck pull over after locating it on Interstate 85. Plaintiff concedes that the truck made no effort to comply with this direction and, in fact, attempted to elude the officers. In addition, it is undisputed that the stolen truck rammed the back of Deputy Cox's patrol car at least one time at a speed of 70 miles per hour. There is no dispute that the truck was speeding down the interstate in a reckless manner at this point. Finally, the facts are clear that this incident occurred on Interstate 85 at approximately 7:30 a.m. during the morning rush hour when traffic is its heaviest.

As noted above, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Judging the incident from the perspective of a reasonable officer on the scene during the heated pursuit and applying the factors relating to the use of deadly force as set forth by the Supreme Court, Deputy Cox was justified in using deadly force to prevent the truck's escape and to defend himself against what he reasonably perceived to be its aggressive maneuvers. After the stolen truck refused to stop in response to the officers' direction, rammed the deputy's patrol car at 70 miles per hour, and generally began driving in a reckless manner on the interstate during rush hour traffic while hauling two wave runners, Deputy Cox had probable cause to believe that the truck and its occupants posed a threat of serious physical harm, either to himself and Deputy Looney or to other innocent commuters regardless of the subjective intentions of the truck driver and of

Plaintiff.[3] Even if the truck did not purposely swerve at Deputy Cox's car as he was trying to drop back into a position behind the truck, it was reasonable for Deputy Cox to believe that the driver of the truck was attempting to injure him in light of the previous collision between the two cars and the undisputedly reckless driving by the driver of the truck. Further, it was not feasible for Deputy Cox to warn the truck driver or its occupants prior to using deadly force in the context of a high speed chase along a crowded interstate. Accordingly, it was not constitutionally unreasonable to prevent the truck's escape and to defend himself by using deadly force. *See Smith v. Freland*, 954 F.2d 343, 347, (6th Cir. 1992) (officer acted reasonably in using deadly force to apprehend motorist who had fled from officer at speed of 90 miles per hour and who posed a threat to officer's safety); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) (finding officer's use of deadly force reasonable when officer had probable cause to believe that plaintiff's truck had attempted to force several police cars off the road); *Parris v. Town of Alexander City*, 45 F. Supp. 2d 1295, 1303 (M.D. Ala. 1999)

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[3] Although not relevant to the officer's decision to fire the first round of shots at the truck which injured Plaintiff, Deputy Cox's concern for his own safety and that of other drivers on the road was clearly justified in light of the truck's erratic and highly dangerous progress throughout the remainder of the chase. It is undisputed that the stolen truck – dragging at least one wave runner on the ground behind it – collided with several vehicles on the road and eventually caused Deputy Cox to lose control of his vehicle and crash into a guard rail, injuring the deputy and damaging his car.

(finding police officers reasonable in firing shots at fleeing motorist where suspect had already injured one officer with his vehicle even if suspect had no intent to injure the officer and was merely trying to escape); *Puglise v. Cobb County*, 4 F. Supp. 2d 1172, 1180 (N.D. Ga. 1998) (Story, J.) (finding 54 rounds fired at truck without prior warning, including shots fired after truck came to a halt, objectively reasonable under the circumstances regardless of suspect's intent where officers reasonably believed suspect was driving "in a manner intended to injure them and other officers."); *Dudley v. Eden*, 49 F. Supp. 2d 581, 586-87 (N.D. Ohio 1999) (finding officer's conduct in firing shots at unarmed fleeing bank robber objectively reasonable after suspect attempted to flee the scene in his vehicle "creating danger for pedestrians and motorists alike.").

Because the undisputed facts regarding the high speed chase on the morning of January 5, 1998 reveal that Deputy Cox did not violate Plaintiff's Fourth Amendment rights as a matter of law, Defendant Deputy Cox is entitled to summary judgment. Furthermore, because the Court finds that Plaintiff suffered no constitutional violation at the hands of Deputy Cox, Defendants Yeager and Coweta County are also entitled to summary judgment with respect to Plaintiff's derivative claims against them arising out of the same incident. *See Rooney v. Watson*, 101 F.3d 1378, 1381-82 (11th Cir. 1996) (no actionable claim for unconstitutional municipal policy or failure to train where there has been no constitutional violation), *cert. denied*, 522 U.S. 966 (1997).

The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims in light of

the failure of Plaintiff's federal cause of action. 28 U.S.C. § 1367(c)(3).

III. CONCLUSION

Based upon the foregoing, Defendants' Motion for Summary Judgment [#16-1] is **GRANTED** with respect to Plaintiff's § 1983 claim. Plaintiff's remaining state law claims are **HEREBY DISMISSED**. The Clerk is **DIRECTED** to enter judgment accordingly. Because the Court did consider the supplemental materials filed by Plaintiff in deciding Defendants' motion for summary judgment, the Motion to Supplement Plaintiff's Response to Defendants' Motion for Summary Judgment [#28-1] is **GRANTED**. Defendants' Motion to Exclude Plaintiff's Use of an Undisclosed Expert Witness [#30-1] is **DENIED AS MOOT**.

SO ORDERED, this 22 day of July, 2000.

/s/ Jack Camp
JACK T. CAMP
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals

For the Eleventh Circuit

No. 00-14380

District Court Docket No.
99-00006-CV-JTC-3

JERRY CHARLES VAUGHAN,

Plaintiff-Appellant,

versus

FRED LAWRENCE COX, OFFICER, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA, MIKE YEAGER, SHERIFF in his official capacity as Sheriff of Coweta County,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 31, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE

Nov. 21, 2001

U.S. COURT OF APPEALS
ATLANTA, GA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JERRY CHARLES VAUGHAN, Plaintiff, V. FRED LAWRENCE COX, Officer, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA, MIKE YEAGER, Sheriff in his official capacity as Sheriff of Coweta County, Defendants.	**CIVIL ACTION NO.** **3:99-cv-JTC** **(Filed Dec. 19, 2001)**

ORDER

The mandate of the United States Court of Appeals having been read and considered, it is

Ordered and Adjudged that the mandate of the United States Court of Appeals be and it hereby is made the judgment of this Court.

Dated in Newnan, Georgia this 14 day of Dec., 2001.

/s/ Jack Camp
JACK T. CAMP
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14380-II

JERRY CHARLES VAUGHAN,

Plaintiff-Appellant,

versus

FRED LAWRENCE COX, OFFICER, individually and in his official capacity as an officer of the Coweta County Sheriff's Department, COWETA COUNTY, GEORGIA, MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Nov. 13, 2001)

Before CARNES, COX and NOONAN*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Jerry Charles Vaughan is DENIED. Judge Noonan would grant the petition. No judge in regular active service on the court having requested that the court be polled on rehearing en

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* Honorable John T. Noonan, Jr., U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case and Names of Parties

November 13, 2001

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-14380-II Jerry Charles Vaughn v. Fred Lawrence Cox
DC DKT NO.: 99-00006 CV-JTC-3

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

THOMAS K. KAHN, Clerk

Reply To: Tonya Durnas
(404) 335-6178

Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

JERRY CHARLES VAUGHAN
Plaintiff

vs.

OFFICER FRED LAWRANCE COX, (individually and in his official capacity as an Officer of Coweta County Sheriff's department), COWETA COUNTY, GEORGIA And SHERIFF MIKE YEAGER (in his Official capacity as Sheriff of Coweta County
Defendants

CIVIL ACTION FILE NO: 3:99-CV-006-JTC

STATE OF GEORGIA
COUNTY OF WHITFIELD

AFFIDAVIT OF VANDIVER W. KELLER IN OPPOSITION OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMES NOW, before the undersigned officer authorized to administer oaths, VANDIVER W. KELLER, who upon being duly sworn states on oath as follows:

-1-

My name is Vandiver (Van) W. Keller. I reside in Rocky Face, Georgia I have been retained by Jeffrey J. Dean, attorney.

-2-

I make this affidavit based upon my own training, experience and education, and I am fully competent to testify to the matters contained herein.

-3-

My training and education in the areas of law enforcement has been as follows: Georgia State Patrol Basic Training School; Cobray International Counter-Terrorist Course; Personal instruction in techniques of Modern Pistolcraft from Barry Worrell of the American Pistol Institute; Federal Law Enforcement Training Center (FLETC) firearms instructor course; U.S. Army Elevated Urban Operations/Anti-Terrorist Course; U.S. Marshall Service Outlaw Motorcycle Gangs Seminar; Lethal Force Institute Advanced Police Survival Course; U.S. Army Advanced EUO/AT Course; Defense training, Inc., Advanced Firearms and Tactics Course; U.S. Army Hostage Rescue Course; Street Survival Police Training Seminars; Personal Protection Consultants, Police Training Division, PR24 Police Baton Instructor Course; Control and Restraint Instructor Course; NRA Law Enforcement Rifle Instructor Course; Police Marksman Association Officer Survival Seminar; Street Survival II, The tactical Edge, Seminar; GSG9 (Germany) Counter-Terrorist Training (4 weeks); NRA Law Enforcement Submachine gun instructor; Georgia State Patrol Semi-Automatic Pistol transition; NRA Long Range Rifle Instructor Course; Heckler & Koch Advanced Submachine Gun Course; Heckler & Koch dynamic entry course; ASLET National Training Conference; IALEFI Annual Training Conference; IPTM Interviews and Interrogations Course; Bill

Rogers Shooting School, Intermediate Handgun/Shotgun; Verbal Judo Instructor Course; Georgia State Patrol In Service Training; Extensive Self-Education through state of the art books, manuals and magazines; competitive shooting with revolvers, pistols, shotguns, submachine guns and rifles; contact with other professional instructors nationwide and personal experimentation with new techniques.

-4-

My experience includes as follows twenty-five years as a Georgia State Trooper; GSP Special response Team Member for fourteen years; Tactical Firearms Instructor for Georgia State Patrol Special Response Team, 14 years; Officer Survival Instructor for Georgia State Patrol Basic Training School for five years; Professional Firearms Instructor for twenty-three years; Rated as expert on Georgia State Patrol Firearms qualifications; numerous top three finishes in local IPSC competition; Georgia State Patrol Troop A Top Marksman Award, First Place in the GSG9 Shooting Competition, Bonn, German. [sic] While I instructed at Cobray International for four years, I taught students from many different countries, including teaching through an interpreter. I was responsible for training all Georgia State Patrol personnel with high-risk assignments at the 1988 Democratic Convention including the Command Staff and Special Response Team. I have taught classes in several different states with my students including Federal Agents from the FB, DEA, ATF, NSA, U.S. Customs, NASA Security, U.S. Marines, U.S. Army SRT, British Royal Marines, Sheriff Departments, Police Departments (Including New York and Washington, D.C.), private security officers, armored car personnel,

and private investigators. I have instructed students from thirty seven states and seven foreign countries at the International Association of Law Enforcement Firearms Instructors annual training conference in Washington D.C. I have been a staff instructor at the American Society of Law Enforcement Trainers National Training Conference in Milwaukee Wisconsin. I was a staff instructor at IALEFI Annual Training conference in Tampa, Florida. I have appeared on the Law Enforcement Television Network (LETN). I have presented seminars to churches, hospitals, banks, schools, health clubs, colleges, corporations, state agencies, civic and professional organizations, as well as the general public. I have been a columnist on Officer Survival in the Georgia State Trooper Magazine. I have written articles and trade publications such as the *Police Marksman. The Firearms Instructor,* and *Combat Handguns.* I have been a consultant to the TechPak Corp. of New York City in matters of firearms training and equipment for three years. I have taught as an adjunct instructor for the IPTM, Institute of Police Training and Management in Jacksonville, Florida. I have appeared in Court as an expert in Police Procedures in the use of deadly force. I have written and produced an internationally marketed instructional video tape: Weaponcraft Kata-Dryfire Training System. I have been involved in over a hundred motor vehicle pursuits and have discharged my weapon in the line of duty.

-5-

I have been certified in the following areas: Federal Law enforcement Training Center Firearms Instructor; National Rifle Association Law Enforcement Handgun Instructor; National Rifle Association Law Enforcement

Shotgun Instructor; National Rifle Association Law Enforcement Rifle Instructor; National Rifle Association Law Enforcement Submachine Gun Instructor; Georgia Peace Officers Standards and Training Firearms Instructor; Georgia Board of Private Detectives and Securities Agencies Instructor; Personal Protection Consultants PR24 Police Baton Instructor; Personal Protection Consultants Control and Restraint Instructor; NAUI Law Enforcement Search and Rescue SCUBA Diver; Verbal Judo Institute Instructor.

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I am a member of the following law enforcement related associations: Former Member of the Board of Directors of the International Association of Law Enforcement Firearms Instructors; Southern States Police Benevolent Association; American Society of Law Enforcement Trainers; National Rifle Association; Police Marksman Association; National Association of tactical Officers; American Women's Self-Defense Association; American Association of State Troopers.

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At the request of Plaintiff's counsel, I have reviewed the following materials in the above styled case:

(1) Deposition of Plaintiff, Jerry Vaughan;

(2) Deposition of Defendant, Fred Lawrance Cox;

(3) Deposition of Sheriff Mike Yeager;

(4) Deposition of Jeff Looney, Deputy;

(5) Deposition of Ernest Tobin;

(6) Deposition of James E. White;

(7) GBI Investigation File, investigation of the shooting of Plaintiff Jerry Vaughan by Defendant Cox;

(8) Georgia Post Training Standards for pursuits and use of deadly force;

(9) Coweta County written policy manual regarding use of deadly force and pursuits;

(10) International Chiefs of Police Association Training Keys on high speed pursuits and use of force;

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I have been asked to resolve conflicts, should they be found to exist, in the factual testimony of the witnesses, including the parties, in a light most favorable to the Plaintiff. However, many of the opinions expressed in this affidavit hold true whether or not you believe the testimony rendered by the Plaintiff. Defendant Cox, or Deputy Looney. Based upon my review of the material described above, together with my education, training and experience, and assuming the facts and circumstances as presented to me in the above referenced material, I hold the following opinions to a reasonable degree of certainty within my areas of expertise in the field of police operations and procedures, high speed vehicle pursuits, and use of deadly force:

(a) The shooting of Plaintiff Jerry Vaughan by defendant Fred Cox was a violation of well established Georgia Law, a violation of Coweta County Department policy, and a violation of well established standard law

enforcement procedures recognized both in Georgia and Nationally.

The shooting of Plaintiff Vaughan by Defendant Cox was not justified for the following reasons:

(b) Plaintiff Vaughan offered absolutely no threat of deadly force to Defendant Cox or anyone else in order to justify his shooting. In fact, Plaintiff Vaughan visibly showed his intention to surrender to Defendant Cox. Georgia Law, Coweta County Department Policy, and standards law enforcement procedures all state that use of deadly force requires a threat of deadly force by the victim with the victim having the ability to carry out the deadly force, the opportunity to carry out the deadly force and there must be true jeopardy, where the officer has a true fear for his life. None of these were present in this case.

(c) It is a well established and long recognized principle of law enforcement procedure that a car is not to be considered a deadly weapon which would justify the use of deadly force when the law enforcement officer is also in a car. Therefore, even if you assume the testimony of Defendant Cox as true, and even if you assume that his conduct prior to the shooting was proper, (which it was not), any aggressive movements by the subject pickup truck in which Plaintiff Vaughan was a passenger would not have justified the use of deadly force against either the driver or the passenger.

(d) The actions of Defendant Cox in conducting the pursuit at issue were in violation of Coweta County Department Policy and nationally recognized standards of law enforcement procedures. According to Coweta

County policy, Georgia policy, and national standards, a law enforcement officer is not to put himself in a situation involving unreasonable danger by placing himself beside a pursued motor vehicle during a chase. Defendant Cox's actions of placing his patrol car in front of the moving pickup truck and slowing down, and then when bumped, moving to the side of the pickup truck, violating Coweta County policy and nationally recognized standards, cannot be used as a justification for using deadly force. It should be noted that Deputy Jeff Looney, who also was involved in the chase of the subject pickup truck for a much longer period of time than Defendant Cox, never fired his weapon or used any manner of deadly force against said pickup truck in which Plaintiff was a passenger.

(e) Defendant Cox was not justified under any grounds to use deadly force in this situation because, among other factors, at the time of his firing of both series of shots, he had no positive identification of the stolen vehicle and was not sure that he had the right vehicle. While he did have grounds to make a stop, he did not have grounds to shoot. The crime involved was a non-violent property crime. Even under the facts as alleged by Defendant Cox, this was not justification for using deadly force to apprehend the suspects, even if he had a positive identification.

(f) Based upon my training and experience, if any reasonable officer truly believes his life to be in danger after being put in a particular situation, that officer will do everything in his power to remove himself from that situation and avoid being placed in a similar situation again. The fact that Defendant Cox placed his vehicle

alongside the subject pickup truck at least three times, firing twice and stating that he should have fired a third time, clearly evidences that Defendant Cox had no real fear for his life at the time.

(g) Coweta County Policy, Georgia policy and nationally recognized standards of police procedure state that use of deadly force should only be used when all other means of defense have failed. In this particular case, absolutely no other means of defense were used by Defendant Cox prior to his use of deadly force. Instead, Defendant Cox went straight to the top of the "force continuum". Coweta County Policy, Georgia policy and nationally recognized standards of police procedure dictate that use of deadly force can only be justified by the facts known to the officer at that particular time. It is completely improper to attempt to justify a shooting by using knowledge of facts gained after the shooting.

(h) Defendant Cox violated Coweta County policy in his pursuit by failing to use his siren at any time. Coweta County policy dictates that the lights and siren must be used in a pursuit. Use of the siren itself is a non-violent warning to the suspect and in this case, should have been used prior to use of deadly force.

(i) Coweta County policy dictates that Officers involved in a motor vehicle pursuit should maintain a safe distance between their vehicle and the pursued vehicle and that physical contact between the vehicles will not be justified. Under the facts as alleged by Plaintiff, Defendant Cox's hitting his brakes when in front of this pickup truck was improper and in violation of Coweta County policy.

(j) In order to justify use of deadly force, the suspect must present a threat of deadly force with the ability to inflict death or serious bodily injury, the opportunity to do so, and the officer must truly feel in jeopardy for his life. In the case at issue, Plaintiff Vaughan had no ability to use deadly force, and as long as defendant Cox remained in his patrol car, it is highly unlikely that the driver of the pickup truck, by use of the pickup truck only, had any ability to inflict death or serious bodily injury. Even if the pickup truck at issue could be considered a deadly weapon, the only time the driver of the pickup truck would have had the opportunity to use it as a deadly weapon, would have been when Officer Cox negligently placed himself beside or in front of said pickup truck. A law enforcement officer cannot provide the opportunity for the subject to use deadly force as a justification for the officers use of deadly force. Further, as discussed above, the facts of this case strongly evidence that no reasonable officer would have truly felt his life in jeopardy at the times Defendant Cox fired his weapon into the suspect pickup truck.

(k) I have been aware of nationally recognized standards of police procedure or of law enforcement procedure since 1981 that a law enforcement officer should not fire from a moving vehicle at a moving vehicle. While there are certain limited scenarious when shooting out of or into a moving vehicle might be justified, the circumstances surrounding this case, even if the facts as alleged by Defendants are considered to be true, are not even close to justifying a shooting in this case.

(l) Both Georgia standards of police procedure and nationally recognized standards dictate that incidental

contact or bumping between vehicles involved in a high speed pursuit are not to be considered justification for the use of deadly force.

(m) Further, Georgia P.O.S.T. standards and nationally recognized standards state that firearms are not to be used against high speed or reckless drivers. The officers have no right to assume that others will be killed if the perpetrator is not stopped.

(n) It is a nationally recognized standard that law enforcement officers are generally not required to do anything they are not trained for. Based on all of the evidence I have reviewed, and my knowledge of law enforcement training in Georgia, including S.W.A.T. training in Georgia, Defendant Cox has never been trained to fire from a moving vehicle or into another moving vehicle. Nor has he been trained to perform a rolling roadblock. In weapons training, the state of Georgia uses a computer system involving hundreds of potential scenarios. There is no situation in this training system in the State of Georgia that trains a law enforcement officer to shoot from a moving vehicle and into a moving vehicle.

(o) There was absolutely no reason to use deadly force in the pursuit and shooting at issue in this case. Defendant Cox and Coweta County should have been aware that resources were available to them from Georgia State patrol and other agencies, including providing lookouts, stop sticks, and air support. A red four wheel drive Z-71 pickup truck with a tool box and a trailer pulling jet skis would not have been difficult at all to keep track of under the circumstances at issue. More than likely, if

Defendant Cox had never fired and stayed behind the suspects, they could have been apprehended without incident.

(p) The opinions I have set forth in this affidavit regarding nationally recognized standards of use of force are so widely established and well recognized in the law enforcement community, that Coweta County Sheriffs Department should have known that Defendant Cox's shooting was improper.

(q) In the incident that occurred in September 1997, where Defendant Cox was involved in another high speed pursuit involving a property crime in which he fired his weapon from his moving vehicle and into another moving vehicle striking another passenger was so improper and in violation of standards of police procedure recognized in Georgia and nationally, that Coweta County Sheriff's Department should have known that said shooting was improper.

(r) The fact that Defendant Cox was never disciplined or retrained by the Coweta County Sheriffs Department as a result of the September, 1997, shooting incident evidences an obvious intentional disregard for the rights of potential arrestees of Coweta County Sheriffs Department. The fact that Defendant Cox has never been disciplined or retrained as a result of either shooting incident, together with the fact that he has not even been told by anyone with the Coweta County Sheriffs' Department that his actions were improper in these two shooting incidents clearly show a callous disregard for proper police procedure and civil rights of potential arrestees.

Both shooting instances required, at a minimum, retraining of Officer Cox in the use of deadly force, and closer supervision.

Further this affiant saith not.

/s/ Vandiver W. Keller
VANDIVER W. KELLER,

Sworn to and subscribed before
me this 23 day of March 2000.

/s/ Brenda Nix
NOTARY PUBLIC

My commission expires:
Notary Public, Murray County, Georgia
My Commission Expires Dec. 6, 2000

Supreme Court, U.S.
FILED
MAR 12 2002
CLERK

No. 01-1159

In The

Supreme Court of the United States

JERRY CHARLES VAUGHAN,

Petitioner,

Against

FRED LAWRENCE COX, OFFICER, Individually and in his official capacity as an Officer of the Coweta County Sheriff's Department; COWETA COUNTY, GEORGIA; MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals correctly applied settled qualified immunity law in holding that, as of January 5, 1998, it was not clearly established that shooting to disable a fleeing vehicle or its driver was an unconstitutional application of deadly force under the circumstances of this case, where even the plaintiff passenger admitted that the vehicle posed an immediate danger to the lives and safety of innocent motorists in its path.

LIST OF PARTIES

Jerry Charles Vaughan, Petitioner-Plaintiff
Fred Lawrence Cox, Respondent-Defendant

Sheriff Michael Yeager, in his Official Capacity,
Respondent-Defendant

Coweta County, Georgia, Respondent-Defendant

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Respondents, Deputy Sheriff Fred Lawrence Cox (in his individual and official capacity), Sheriff Michael Yeager (in his official capacity) and Coweta County, Georgia, respectfully submit this brief in opposition to the petition for writ of certiorari.

INTRODUCTION

In holding that Deputy Cox was shielded by qualified immunity, the Eleventh Circuit decided no important, unsettled question of federal law and raised no conflict among the circuit courts. The petitioner attempts to suggest otherwise only by erroneously characterizing the opinion below as if it did three things it did not.

First, the opinion below did not, as petitioner contends, hold that the use of force in this case was constitutionally reasonable, thereby encouraging similar conduct by other law enforcement officers. To the contrary, the Eleventh Circuit held that the alleged conduct, if proved, could constitute excessive force. The court followed the procedure prescribed by *Saucier v. Katz*, 533 U.S. 194, ___, 121 S.Ct. 2151 (2001), by considering the defense of qualified immunity only after first determining that the conduct as alleged would constitute a constitutional violation. Its qualified immunity holding therefore cannot be construed as a determination that the underlying conduct alleged by petitioner was constitutional.

Second, the opinion below does not, as petitioner contends, hold that an officer enjoys qualified immunity

even though the unlawfulness of his conduct is apparent based on existing law, so long as the courts have not decided a case on fundamentally similar facts. Instead, the Eleventh Circuit inquired whether existing law clearly established that the particular conduct here was unconstitutional. This is both consistent with and required by *Saucier v. Katz*, *Anderson v. Creighton*, 483 U.S. 635 (1987) and other decisions of this Court.

Third, the opinion below does not, as petitioner contends, conflict with decisions of the other circuit courts. The various cases cited by petitioner merely deny summary judgment based on materially different facts, and do not reflect a split among the circuits. Ultimately, the opinion below simply applied established qualified immunity law to the particular facts at issue. There is no issue warranting review on certiorari.

STATEMENT OF THE CASE

In a high-speed interstate chase on January 5, 1998, the petitioner, Jerry Charles Vaughan, was paralyzed by a bullet fired by Deputy Cox of the Sheriff's Department of Coweta County, Georgia. At the time, Vaughan was a passenger in a stolen truck that, as he admits, was recklessly fleeing police pursuit, endangering the lives and safety of other motorists during the morning rush hour heading into Atlanta, Georgia. Deputy Cox hit Vaughan in an attempt to disable either the truck or the driver. Pet. App. 4.

The chase started when Deputy Cox and fellow deputy sheriff, Jeff Looney, received a report of a stolen truck

heading north on I-85 towards Atlanta. Officers Cox and Looney soon observed a truck matching this description. Pet. App. 2-3, 26-28. Vaughan does not dispute that the officers had probable cause to believe that this was the stolen truck, and, in fact, it was. *Id.* at 32, 35. Nor does Vaughan deny that he and the driver stole that truck, as well as an attached trailer, two "waverunners" and another truck that they had earlier abandoned. Instead, he pleaded the Fifth Amendment.

After confirming that the occupants and the truck met the reported description, the officers attempted to stop the truck through a "rolling roadblock." Pet. App. 3, 28-29. Deputy Cox positioned his patrol car in front of the truck, with Officer Looney following the truck from behind. *Id.* Vaughan admits that, at least by this time, it was clear that the officers wanted the truck to pull over. *Id.* Deputy Cox then slowed down in an effort to induce the truck to reduce its speed. He testified that the truck rammed the back of his patrol car, almost causing him to lose control of his vehicle. *Id.* Although Vaughan disputes that the driver intentionally rammed Deputy Cox's patrol car, it is undisputed that, instead of slowing down for the rolling roadblock, the truck struck his vehicle at least once from behind. *Id.*

There is also no dispute that the driver refused to stop even after striking Deputy Cox's patrol car. Pet. App. 3-4, 28-29. Instead, as Vaughan admitted at his deposition (p. 89), the truck was "clearly trying to elude the police." Vaughan also admitted that the driver's reckless operation of the truck following this impact threatened the safety of other motorists:

Q. Okay. Obviously [the driver is] going over the speed limit, correct?

A. Yes, sir.

Q. He's weaving in and out of traffic, correct?

A. Yes, sir.

Q. And he has wave-runners on the back of his vehicle, correct?

A. Yes, sir.

Q. So he's driving in a dangerous manner at this time frame, isn't he?

A. Yes, sir.

Q. And he's driving in a reckless manner, correct?

A. Yes, sir.

* * *

Q. And he was putting other citizens on the interstate driving that morning in danger, correct?

A. Yes, sir.

Vaughan Dep., pp. 87-88; Pet. App. 29. Moreover, Vaughan concedes that the driver was driving in this reckless and dangerous manner before Deputy Cox fired the first shot:

Q. So when the police turned the lights on, you took off?

A. He [the driver] did. In other words, he sped up faster.

Q. Right. So before the shots are fired, he speeds up, correct?

A. When he [the police] turns the blue lights on, we speed up to probably about 80 or 85.

Q. So in effect, before shots are fired, he speeds up to avoid the police, correct?

A. Basically.

Q. Okay. And he's going 80 miles an hour now before shots are fired, correct?

A. Yes, sir.

Q. And it's clear at this point that he's trying to elude the police, correct? They got the lights on, and he, instead of slowing down, is speeding up, correct?

A. Yes, sir.

Q. And he's got wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And he's going 80 miles an hour with wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And there's other vehicles on the road and on the interstate that morning; is that correct?

A. That's correct.

Q. So he's driving before shots are fired in a dangerous manner, correct?

A. Yes, sir.

Q. Okay. And he's driving wrecklessly [sic] at that point, correct?

A. Yes, sir.

> Q. And then based on your recollection of the chronology of the events, shots are fired, correct?
>
> A. That's correct.

Vaughan Dep., pp. 89-91; Pet. App. 29, 35.

By this point, Deputy Cox had dropped back alongside the driver's side of the truck. He testified that the driver veered aggressively in his direction, attempting to sideswipe his patrol car. Pet. App. 30. He then fired three bullets at the truck, trying to disable the truck or the driver. *Id.* at 4. One of these shots struck Vaughan, paralyzing him from the waist down.[1] Vaughan disputes that the truck swerved toward Deputy Cox's patrol car, but, as noted above, he does not dispute that the truck was endangering the lives and safety of other motorists in its path before Deputy Cox fired his weapon. *Id.* at 29, 30, 35.

The chase did not end after that first volley of shots. The truck continued to weave recklessly in and out of traffic at high speeds, colliding with other motorists. Pet. App. 30-31. At one point, the truck pulled off the interstate at an exit, barreled through a busy intersection at high speed, running a stop sign and again colliding with innocent motorists. *Id.* Finally, while trying to force its

---

[1] Vaughan initially claimed that he was struck by a second volley of shots that occurred much later in the chase. But, facing summary judgment, Vaughan changed his story to claim that this first volley of shots struck him. For the purposes of the appeal below and this petition, we assume that his current account is true.

way between two vehicles, the driver lost control and crashed. *Id.* at 31-32.

REASONS FOR DENYING THE WRIT

A. The Opinion Below Does Not Establish that Deadly Force is Justified to Stop Fleeing, Speeding Motorists.

Petitioner claims that the opinion below will lead law enforcement officers to conclude that it is lawful to use deadly force to stop fleeing motorists simply because they are speeding. Pet. 10-12. This prediction is baseless for two reasons. First, this is not a case in which a motorist was simply speeding. The petitioner's own perception was that, given all of the conditions on that rush hour morning, *this* vehicle was operating in a "dangerous" and "reckless" manner that immediately endangered the innocent motorists in its path. Certainly that could have been the perception of a reasonable law enforcement officer.

But, more importantly, the Eleventh Circuit did not hold that Deputy Cox's actions were constitutionally reasonable. To the contrary, before ever addressing the qualified immunity question, the Eleventh Circuit held that "[r]esolving all evidentiary disputes in Vaughan's favor, . . . a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup." Pet. App. 10. Thus, the court did precisely as directed by *Saucier,* 533 U.S. at ___, 121 S.Ct. at 2156: "A court required to rule upon the qualified immunity issue must consider, then,

this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *See also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

One purpose of requiring the court to first address the existence of a constitutional violation is to provide notice to officers subsequently confronting similar situations. Through this process, constitutional rights become "clearly established" for qualified immunity purposes.

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.

Saucier, 533 U.S. at ___, 121 S.Ct. at 2156.

Because the Eleventh Circuit followed the approach prescribed in *Saucier*, the opinion below does not establish, for this or any subsequent case, that Deputy Cox's alleged conduct was constitutionally reasonable. To the contrary, this case gives notice that, if events occurred as claimed by the petitioner, such conduct likely would *not* be constitutional. Pet. App. 10-13. Even if the opinion falls short of conclusively foreclosing a qualified immunity defense based on subsequent, similar conduct by other officers, it certainly makes it *more* difficult, not less, to establish such a defense. Thus, the opinion below does

not, as petitioner suggests, declare open season on fleeing motorists.

Petitioner fails to distinguish the reasonableness inquiry governing his underlying excessive force claim from the qualified immunity analysis. This is precisely the distinction confirmed in *Saucier v. Katz*. In that case, this Court rejected the view of the Ninth Circuit that the qualified immunity analysis in an excessive force case simply duplicates the underlying determination of whether the use of force could be found to be unreasonable. 533 U.S. at ___, 121 S.Ct. at 2157. *Saucier* dispels any notion that sustaining a qualified immunity defense establishes the reasonableness of the underlying conduct for Fourth Amendment purposes:

> The qualified immunity inquiry . . . has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

533 U.S. at ___, 121 S.Ct. at 2157-59. Thus, "in excessive force cases, . . . in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable." *Id.* at 2159.

Accordingly, by sustaining the defense of qualified immunity, the Eleventh Circuit did not hold that the conduct alleged by Vaughan would be constitutionally reasonable. Petitioner's first argument for certiorari is meritless because it depends on an over-reading of the qualified immunity portion of the opinion below in a manner contrary to *Saucier v. Katz*.

B. The Writ is Not Warranted to Consider a New and Special Treatment of the "Warning" Prong of *Tennessee v. Garner* for Qualified Immunity Purposes.

In *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), this Court held that:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Petitioner urges that, unlike the other prongs of *Garner*'s test for constitutional reasonableness, the obligation to warn, where feasible, requires no further exposition for qualified immunity purposes. Pet. 13-15. He would have this Court hold that every officer has notice of the obligation to warn, where feasible, without regard to judicial

interpretation of this requirement under any particular facts. But the feasibility of a warning in any given factual setting is not "clearly established" merely from *Garner*, any more than the excessiveness of force in any given situation is "clearly established" by *Graham v. Connor*, 490 U.S. 386 (1989). In *Saucier*, this Court expressly rejected the same argument made with respect to the standard for excessive force established by *Graham*. 533 U.S. at ___, 121 S.Ct. at 2157. "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." 533 U.S. at ___, 121 S.Ct. at 2158.

Petitioner's argument regarding *Garner*'s warning requirement is no better than the argument that this Court rejected in *Saucier*. Whether a warning is "feasible" can depend just as much on the facts as whether force is "excessive." With respect to qualified immunity, there is no justification for analyzing the obligation to warn under any different standard than the other contours of the right to be free from excessive force. Instead, the "dispositive inquiry" is and should be whether, in light of the law established at the time, "it would be clear to a reasonable officer that [firing without prior warning] was unlawful in the situation he confronted." *Saucier*, 533 U.S. at ___, 121 S.Ct. at 2156.

Petitioner makes much of the Eleventh Circuit's holding that, taking the facts in the light most favorable to him, a reasonable jury could conclude that Deputy Cox could feasibly have warned the truck's occupants before firing. Pet. App. 10-11. Petitioner writes as if this should have disposed of the qualified immunity question. But, at

least after *Saucier, every* decision reaching the defense of qualified immunity involves alleged conduct that, if proved, would constitute a constitutional violation; "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." 533 U.S. at ___, 121 S.Ct. at 2156. The question for qualified immunity purposes is not whether the failure to warn was constitutionally reasonable, but whether Deputy Cox could have had a "reasonable, but mistaken" belief that a warning was not feasible under the circumstances of the case. 533 U.S. at ___, 121 S.Ct. at 2158. This is an objective inquiry, based on the legal rules that were clearly established at the time. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

C. The Court of Appeals Properly Analyzed the Question of Qualified Immunity Within the Factual Context of this Case.

The Eleventh Circuit concluded that, even if a jury determined that the truck posed no substantial danger to other motorists or that a warning was feasible under the circumstances, Deputy Cox could have reasonably, but mistakenly believed otherwise. Pet. App. 14-15. In so holding, the court did not, as Vaughan suggests in subsections B and D of his Petition, improperly focus on the facts of this case.

This Court has repeatedly and recently held that "clearly established" for qualified immunity purposes means clearly established in the particular situation confronted by the officer. "[T]here is no doubt that *Graham v.*

Connor, [490 U.S. 386 (1989)] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted." Saucier,* 533 U.S. at ___, 121 S.Ct. at 2156 (emphasis added); *see also Wilson v. Layne,* 526 U.S. 603, 615 (1999) ("[A]s we explained in *Anderson,* the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

A qualified immunity standard that does not focus on the facts of the particular case cannot be reconciled with *Graham* and other cases emphasizing that judgments about the use of force by law enforcement officers must be fact-specific:

> Because "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation," [*Graham,* 490 U.S. at 397], the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. *Id.,* at 396. We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. *Id.,* at 393, 396. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, *"requiring careful attention to the facts and circumstances of each particular case,* including the severity of the crime at issue,

> whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396.

Saucier, 533 U.S. at ___, 121 S.Ct. at 2158 (emphasis added).

The standard for determining whether it was "clearly established" that a particular use of force was constitutionally unreasonable cannot be less fact-sensitive than standard for determining whether it was in fact constitutionally unreasonable. Because the test for excessive force "must accommodate limitless factual circumstances," "the law cannot be elaborated from case to case." *Saucier*, 533 U.S. at ___, 121 S.Ct. at 2158; *see, e.g., Anderson*, 483 U.S. at 641 ("The relevant question in this case, for example, is the objective (albeit *fact-specific*) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.") (emphasis added).

To create the appearance of an issue for certiorari, Vaughan portrays the opinion below as holding that an officer enjoys qualified immunity even though the unlawfulness of his conduct is apparent based on existing law, so long as the courts have not decided a case on fundamentally similar facts. Pet. 13-15, 18-20. But the opinion below contains no holding or even dictum to this effect. Petitioner reads too much into the Eleventh Circuit's observation that "[n]or has the Supreme Court, this court, or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case." Pet. App. 15. This was merely part –

and an appropriate part – of the Eleventh Circuit's broader analysis of whether the law was "defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson." *Id.*

The Eleventh Circuit properly inquired whether existing case law clearly established that the use of deadly force was constitutionally unreasonable "in factual circumstances similar to those in this case." Pet. App. 15 (citing *Anderson v. Creighton*). This is no different than the "relevant, dispositive inquiry" formulated in *Saucier* – "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" 533 U.S. at ___, 121 S.Ct. at 2156 (emphasis added). In conducting this inquiry, the Eleventh Circuit went no further than cases such as *Saucier v. Katz*, *Anderson v. Creighton* and *Wilson v. Layne*. It did not, as petitioner suggests, impose an artificial requirement that there must be some fundamentally factually similar case, even if the unlawfulness of the officer's conduct is clear from existing precedent. Indeed, at the time that the Eleventh Circuit decided the instant case, it had already squarely rejected any such proposition. *See Priester v. City of Rivera Beach, Fla*, 208 F.3d 919, 926-27 (11th Cir. 2000) ("Considering these facts, no particularized case law was necessary for it to be clearly established that what Defendant Walker did violated Plaintiff's constitutional right to be free from the use of excessive force."). Here the court merely and appropriately considered whether the existing case law clearly established that the particular conduct at issue in Vaughan's case was unlawful. This is the

distinction drawn in *Anderson*: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." 483 U.S. at 640 (citation omitted).

For this reason, there is no conflict between the opinion below and *United States v. Lanier*, 520 U.S. 259 (1997), as petitioner suggests. *Lanier* interpreted 18 U.S.C. § 242, which imposes criminal liability on an official violating constitutional rights under color of state law. This Court observed that "we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." 520 U.S. at 269. Nothing in the opinion below purports to hold to the contrary.

In holding that Deputy Cox was entitled to qualified immunity, the Eleventh Circuit not only applied the correct law, but applied it correctly. There is nothing erroneous, let alone cert-worthy, in holding that a law enforcement officer could reasonably, even if mistakenly, conclude that shooting to disable the truck or the driver was constitutionally permissible under the facts of this case. *Garner* permits the use of deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." 471 U.S. at 11. Here the circumstances of the case, even according to petitioner's own testimony, permitted a reasonable law enforcement officer to believe that the truck posed a threat of serious physical harm – even death – to

other motorists in its path. Thus, any factual dispute over whether the truck posed a threat to the officers is moot.

And, although a jury could reach a different conclusion, a law enforcement officer could reasonably, even if mistakenly, believe that no further warning was feasible under these circumstances. Deputy Cox was driving at 80 to 85 miles per hour on the left side of the fleeing truck, which petitioner concedes was operating in a "dangerous" and "reckless manner." He could have concluded that displaying a weapon from the left (driver's) seat in the patrol car was not a feasible way to warn the occupants of the truck, sitting in an elevated position in the lane to his right. And the driver had already ignored other clear warnings to stop, including blue lights, sirens and the "rolling roadblock." Indeed, the driver's response to these measures, even after striking Deputy Cox's patrol car, was simply to drive faster and more dangerously. Under these "tense, uncertain, and rapidly evolving" circumstances, Deputy Cox could have reasonably, even if mistakenly, concluded that no further warning was feasible or necessary, and that delay would only have increased the risks to others. *Graham*, 490 U.S. at 397.

In this qualified immunity context, petitioner's heavy reliance on law enforcement guidelines is unwarranted. As observed by the Fourth Circuit, modern law enforcement guidelines are formulated in large part to protect third party bystanders and officers from injury, and thus almost invariably exceed the standards dictated by the constitutional rights of the suspect. *Howerton v. Fletcher*, 213 F.3d 171, 173 (4th Cir. 2000). For example, there is no court decision clearly establishing that the *constitution*

prohibits discharging a firearm at or from a moving vehicle or pulling alongside a fleeing motorist in an attempt to force the motorist into a curb, parked car, or other obstacle. *Cf.* Pet. at 6-7. And, unlike Coweta County's policy on the use of force, the *constitution* does not require an officer to exhaust all other alternatives before using deadly force. *See, e.g., Menuel v. City of Atlanta,* 25 F.3d 990, 996-997 (11th Cir. 1994); *Plakas v. Drinski,* 19 F.3d 1143, 1148-50 (7th Cir. 1994); *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994). The law enforcement guidelines cited by Vaughan quite appropriately exceed the floor on police conduct established by the federal constitution and do not "clearly establish" constitutional rights for qualified immunity purposes. *See Davis v. Scherer,* 468 U.S. 183, 194-96 (1984) ("[O]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Edwards v. Gilbert,* 867 F.2d 1271, 1277 (11th Cir. 1989); *Gagne v. City of Galveston,* 805 F.2d 558, 560 & n.2 (5th Cir. 1986). Thus, the fact that certain conduct is plainly prohibited by law enforcement guidelines does not and should not mean that it is also prohibited by the constitution.

D. The Writ is Not Warranted to Resolve Any Conflict Among the Circuits.

In a scatter-shot approach, the petitioner alternatively urges that the opinion below conflicts with various other circuit court opinions. However, these cases do not conflict with the Eleventh Circuit's opinion, but

merely deny summary judgment on qualified immunity based on materially different facts.

In *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001), the First Circuit cited *U.S. v. Lanier* for the proposition that " 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.' " 264 F.3d at 114 (quoting *Lanier*, 520 U.S. at 271). In attempting to portray a conflict between the opinion below and *Davis*, petitioner again wrongly characterizes the opinion below as sustaining the qualified immunity defense simply because there was no existing case with the same factual quirks. However, nothing in the Eleventh Circuit's opinion below holds that, even where prior "decisional law- . . . appl[ies] with obvious clarity to the specific conduct in question," the officer is entitled to qualified immunity so long as "the very action in question has not previously been held unlawful." *Id.* Instead, the Eleventh Circuit follows the opposite rule. *Priester*, 208 F.3d at 926-27.

In *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the officer fired at a suspect who was driving towards him in a stolen cab. The Seventh Circuit held that the officer was not entitled to summary judgment on qualified immunity because, resolving all disputes in favor of the plaintiff, the fleeing cab was a threat to the officer only because he stepped directly into its path without necessity. There was no evidence or argument that the cab posed a threat to others. *Enyart* is a narrow holding, driven by the specific facts of the case, and does not conflict with the opinion below. And *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) is markedly different

than Vaughan's case because the suspect (who had rolled through a stop sign) was driving at 25 miles per hour and posed no threat to anyone when the pursuing police officer shot him in the back.

McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999) neither helps the petitioner nor conflicts with the opinion below. There the officer shot the driver of a fleeing truck, but only *after* it had left the highway and rolled down an embankment. The Eighth Circuit held that the officer was not entitled to qualified immunity because, construing the evidence in favor of the plaintiff, the truck did not remain a threat to anyone after leaving the highway. The Eighth Circuit distinguished its earlier decision in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), in which "an officer used deadly force to stop a renegade truck driver, who was at the time still in the process of fleeing from the police on a busy highway." 183 F.3d at 779. *Cole* held that the use of force was constitutionally reasonable under those circumstances. Vaughan's case is like *Cole*, not *McCaslin*, and there is no conflict between the Eighth and Eleventh Circuits.

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) also bears no resemblance to this case. There an officer fired a lead-filled "beanbag round" at the head of a person "who was walking at a 'steady gait' in his direction" but who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." 272 F.3d at 1275. Unlike this case, *Deorle* was not a case in which "the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." *Garner*, 471 U.S. at 11. Nor does the

legal analysis in *Deorle* conflict with the opinion below. The officer admitted knowing that the beanbag round was potentially lethal at the distance from which he fired, and a reasonable officer would have known from existing law that the use of lethal force was not justified under those facts. Under those circumstances, the Ninth Circuit appropriately declined to hold that the officer was entitled to qualified immunity simply because there were no published cases involving the use of lead-filled beanbag rounds. Nothing in this analysis conflicts with the Eleventh Circuit's opinion below.

In *Rosales v. City of Phoenix*, No. 99-17204, 2001 U.S. App. LEXIS 27599, at *3 (9th Cir. Dec. 26, 2001), the Ninth Circuit not surprisingly affirmed the denial of summary judgment where the officers shot a fleeing suspect in the back, but admitted that they "did not consider [him] a fleeing felon," that he "never turned and aimed his gun at them," and there was no evidence that he posed a threat to others. In *Bray v. County of San Diego*, No. 93-55446, 1994 U.S. App. LEXIS 4289 (9th Cir. Mar. 2, 1994), the Ninth Circuit affirmed the denial of summary judgment on a qualified immunity defense where the officer fired as the suspect was backing his truck towards the officer's patrol car in a parking lot from a distance of ten feet. Under those facts, the officer had no reasonable basis to fear for his own life or safety, and the case did not involve any threat to others.

Finally, there is no conflict between the opinion below and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), which arose from the 1992 events at Ruby Ridge. The Ninth Circuit affirmed

the denial of qualified immunity with respect to the "Special Rules of Engagement" formulated for Ruby Ridge, which allegedly included the authorization to shoot on sight any adult male in the vicinity of the Weaver Cabin, regardless of any threat he posed. 126 F.3d at 1202. Taking this allegation as true, the Ninth Circuit held that it was clearly established that those Special Rules of Engagement did not comply with *Tennessee v. Garner*. *Id.* The only specific shooting examined by the Ninth Circuit is not analogous to Vaughan's case. The agent shot as the plaintiff was running back to the cabin and was not making an aggressive move of any kind. *Id.* at 1202-03. At this point, the officer and his fellow agents "were safely ensconced on the hill overlooking the Weaver cabin." *Id. Harris* does not conflict with the opinion below.

In sum, the cases cited by petitioner simply deny summary judgment on the qualified immunity defense under facts materially different than those at issue here. Instead of demonstrating any conflict among the circuits, these cases simply emphasize the factually intensive nature of the qualified immunity defense.

CONCLUSION

In the opinion below, the Eleventh Circuit applied correct principles of qualified immunity law in a manner that does not warrant review on certiorari. The writ should be denied.

Respectfully submitted,

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